(A)

No. 88-325-CSX
Status: GRANTED

Docketed:
August 23, 1988

Title: American Trucking Associations, Inc., et al., Petitioners
v.
Maurice Smith, Director, Arkansas Highway and Transportation Department, et al.

Court: Supreme Court of Arkansas

Counsel for petitioner: Frey,Andrew L.

Counsel for respondent: Friday Jr.,Herschel H.

Entry	Date	Note	Proceedings and Orders
1	Jul 15 1988	G	Application (A88-47) to extend the time to file a petition for a writ of certiorari from July 24, 1988 to August 23, 1988, submitted to Justice Blackmun.
2	Jul 20 1988		Application (A88-47) granted by Justice Blackmun extending the time to file until August 23, 1988.
3	Aug 23 1988	G	Petition for writ of certiorari filed.
5	Sep 19 1988		Order extending time to file brief of respondent on the merits until October 21, 1988.
6	Oct 20 1988		Brief of respondents Maurice Smith, Director, et al. in opposition filed.
7	Oct 26 1988		DISTRIBUTED. November 10, 1988
8	Oct 26 1988		REDISTRIBUTED. November 10, 1988
9	Oct 28 1988	X	Reply brief of petitioner American Trucking Association filed.
10	Nov 14 1988		Petition GRANTED. The case is consolidated with 88-192 and a total of one hour is allotted for oral argument. **********
12	Nov 28 1988		Order extending time to file brief of petitioner on the merits until January 7, 1989.
14	Jan 6 1989		Brief amicus curiae of National Private Truck Council, Inc. filed.
15	Jan 6 1989		Brief amicus curiae of Committee on State Taxation filed. VIDED.
16	Jan 6 1989		Brief amicus curiae of Tax Executives Institute, Inc. filed. VIDED.
20	Jan 18 1989		Brief of petitioner American Trucking Association filed.
18	Jan 19 1989		Order extending time to file brief of respondent on the merits until February 21, 1989.
19	Jan 19 1989		Record filed.
		*	Certified copy of original record, box, received.
21	Jan 19 1989	G	Motion of respondents for divided argument filed.
22	Jan 23 1989	G	Motion of petitioners for divided argument filed.
23	Feb 3 1989		SET FOR ARGUMENT WEDNESDAY, MARCH 22, 1989. (4TH CASE)
26	Feb 17 1989		Brief amici curiae of Vermont, Connecticut and New Jersey filed.
24	Feb 21 1989		Motion of respondents for divided argument GRANTED. The request for additional time for oral argument is denied.
25	Feb 21 1989		Motion of petitioners for divided argument GRANTED. The request for additional time for oral argument is denied.
27	Feb 21 1989		Brief amicus curiae of Transport Cabinet of Kentucky filed.
28	Feb 21 1989		Brief of respondents Maurice Smith, et al. filed. VIDED.

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No. 88-325-CSX

Entry	Date	Note	Proceedings and Orders
30	Feb 21 1989		Brief amici curiae of National Conference of State Legislatures, et al. filed. VIDED.
31	Feb 21 1989		Brief amici curiae of California, et al. filed. VIDED.
32	Feb 21 1989		Brief amici curiae of Pennsylvania, et al. filed.
33	Feb 24 1989		CIRCULATED.
34	Mar 6 1989	X	Joint appendix filed.
35	Mar 10 1989	G	Application (A88-719) to file a reply brief in excess of page limits, submitted to Justice Blackmun.
36	Mar 13 1989		Application (A88-719) granted by Justice Blackmun, allowing a maximum of 25 pages.
37	Mar 15 1989	X	Reply brief of petitioner American Trucking Association filed. VIDED.
38	Mar 15 1989		LODGING RECEIVED.
39	Mar 22 1989		ARGUED.
40	Jul 3 1989		This case is restored to the Calendar for reargument. This case is allotted 45 minutes for reargument.
41	Jul 27 1989	N	Motion of of the parties for leave to file supplemental briefs on reargument filed.
42	Aug 15 1989		Brief amicus curiae of Crow Tribe of Indians filed. VIDED.
43	Sep 26 1989		SET FOR REARGUMENT WEDNESDAY, DECEMBER 6, 1989. (4TH CASE)
44	Oct 19 1989		CIRCULATED.
45	Oct 20 1989	G	Motion of respondents for leave to file a brief on reargument filed.
46	Nov 6 1989		Motion of respondents for leave to file a brief on reargument GRANTED.
47	Nov 14 1989	G	Motion of petitioners for leave to file a supplemental brief on reargument filed.
48	Nov 27 1989		Motion of petitioners for leave to file a supplemental brief on reargument GRANTED.
50	Dec 6 1989		REARGUED.

88-325

No.

Supreme Court, U.S.
FILED
AUG 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

In *American Trucking Associations, Inc.* v. *Scheiner*, 107 S.Ct. 2829 (1987), this Court held that flat Pennsylvania highway use taxes violated the Commerce Clause because they discriminated against out-of-state truckers. Three days later, the Court vacated a decision of the Arkansas Supreme Court upholding a flat Arkansas highway use tax indistinguishable from the Pennsylvania taxes and remanded for further consideration in light of *Scheiner*. *American Trucking Association, Inc.* v. *Gray*, 107 S.Ct. 3252 (1987). Arkansas nevertheless refused to stop collecting its tax for highway use during the following tax year. On remand, the Arkansas Supreme Court invalidated the tax under *Scheiner* but held that the taxpayers were not entitled to refunds of (a) any taxes illegally levied prior to the decision in *Scheiner* or (b) most of the taxes exacted for highway use during the following tax year.

The questions presented are:

1. Whether this Court's decision in *Scheiner* should be applied retroactively.

2. Whether, even if the decision in *Scheiner* is not retroactive, Arkansas was entitled to collect and ultimately to retain unconstitutional highway taxes for a tax year that did not even begin until after the *Scheiner* decision.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Petitioners are certified plaintiff classes consisting of motor carriers whose vehicles were "subject to the Highway Use Equalization Tax embodied in Act 685 of 1983," in addition to the following named plaintiffs:

Petitioner American Trucking Associations, Inc. (ATA), is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Petitioner Arkansas Motor Carriers Association, Inc., formerly the Arkansas Bus & Truck Association, Inc., is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Petitioner Leon Cawood is a sole proprietor doing business as Leon Cawood Trucking.

Petitioner Commercial Carriers Inc. is a wholly owned subsidiary of Ryder Commercial Transport, Inc., which is in turn a wholly owned subsidiary of Ryder System, Inc. Commercial Carriers' affiliates or subsidiaries (other than wholly owned subsidiaries) are Automotive Railhandling Inc.; B & C Inc.; Blazer Truck Lines, Inc.; Carrier Support, Inc.; Complete Auto Transit, Inc.; Delevan Industries, Inc.; F. J. Boutell Driveaway Co., Inc.; Fleet Carrier Corporation; Fleet Carrier Dealer Services, Inc.; Janesville Auto Transportation Company; M & G Convoy, Inc.; Murray Sandblast & Paint, Inc.; National Trucking Company; Ryder Energy Distribution Corporation; Ryder Truck Rental, Inc.; Summit Industries, Inc.; and Transport Support, Inc.

Petitioner Diamond Transportation System, Inc., is an independent corporation whose subsidiaries and affiliates (other than wholly-owned subsidiaries) are Fox Transportation, Inc.; Sed. Air, Inc.; and Snicknej Co.

Petitioner Joe Fortenberry is a sole proprietor doing business as Fernwood Transportation.

Petitioner Jones Truck Lines, Inc., which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Sun Carriers, Inc.

Petitioner Rollins Leasing Corporation is a wholly owned subsidiary of R.L.C. Corporation. Rollins' affiliates or subsidiaries (other than wholly owned subsidiaries) are Rollins Dedicated Carriage Services, Inc. and Rollins-Matlack Administrative Services, Inc.

Petitioner Transcon Lines, which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Transcon, Inc.

Respondents are the following defendant state officials, or their successors—Maurice Smith, Director, Arkansas Highway and Transportation Department (Mr. Smith's predecessor in office, Henry C. Gray, was the lead defendant in the earlier proceedings in this case); Dalton Farmer, Ron Herrod, Patsy Lee Thomasson, Robert Pritchett, Jr., and Bobby Hopper, members of the Arkansas State Highway Commission; John Bailey, Chief of the Arkansas Highway Police Division of the Arkansas Highway and Transportation Department; Charles D. Ragland, Commissioner of Revenues, Revenue Division, Arkansas Department of Finance and Administration; Jimmi Lou Fischer, Treasurer of the State of Arkansas; and Mahlon Martin, Director, Arkansas Department of Finance and Administration—and intervenor-defendants O.K. Enterprises, Inc., Peterson Industries, Inc., and Pilgrim's Pride Corporation, doing business collectively as the Arkansas Poultry Federation.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.———

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY
AND TRANSPORTATION DEPARTMENT, ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

American Trucking Associations, Inc., *et al.* (ATA), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS

The opinion of the Supreme Court of Arkansas (App. A, *infra*) is reported at 295 Ark. 43, 746 S.W.2d 377. The opinion of Justice Blackmun, in his capacity as Circuit Justice, with respect to interim injunctive relief (App. C, *infra*) is reported at 108 S.Ct. 2. The orders of the Supreme Court of Arkansas denying rehearing (App. B, *infra*), denying interim relief (App. D, *infra*) and denying a remand to Chancery Court for interim relief (App. E, *infra*) are unreported. The order of this Court remanding the prior appeal to the Supreme Court of Arkansas (App. F, *infra*), is reported at 107 S.Ct. 3252.

An opinion of the Supreme Court of Arkansas on a prior appeal (App. G, *infra*) and its supplemental opin-

ion on the denial of rehearing thereof (App. H, *infra*) are reported at 288 Ark. 488, 707 S.W.2d 759, and 288 Ark. 506-A, 709 S.W.2d 410, respectively. The opinion of the Supreme Court of Arkansas affirming the denial of interlocutory relief (App. I, *infra*) is reported at 280 Ark. 258, 657 S.W.2d 207.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App., *infra*, 1a) was rendered on March 14, 1988, and a timely petition for rehearing was denied on April 25, 1988 (App., *infra*, 7a). On July 20, 1988, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including August 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

STATEMENT

1. On June 23, 1987, this Court struck down two Pennsylvania flat highway use taxes as violative of the Commerce Clause of the United States Constitution. *American Trucking Associations, Inc.* v. *Scheiner*, 107 S.Ct. 2829. This case concerns the retroactive and prospective effect of the decision in *Scheiner* on an Arkansas tax materially indistinguishable from one of the invalid Pennsylvania taxes.

The Arkansas Highway Use Equalization (HUE) Tax, Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (Supp. 1985), enacted in 1983 and repealed in October 1987, required heavy trucks operating on Arkansas' highways to pay either an annual flat tax of $175 or a tax of 5¢ per mile traveled in Arkansas. The proceeds—estimated by the Arkansas Supreme Court to be over $160 million during the life of the tax (App., *infra*, 3a)—were dedicated to maintenance of the State's highways.

Under this scheme, Arkansas effectively taxed only the first 3,500 miles of annual highway use by a given vehicle—that being the point at which it became advantageous to pay the flat $175 rate. Any additional high-

way use, though obviously causing the same amount of highway wear and tear, was free of tax. The result of this tax structure was that frequent users of the State's highways paid a substantially lower tax per mile of operations than did less frequent users. Because vehicles based in Arkansas were likely to log many more miles within the State than vehicles based elsewhere, the tax produced a substantial discrimination against interstate commerce in terms of per-mile costs, as the court below acknowledged (App., *infra*, 2a).

The HUE tax was imposed for the privilege of operating during a July 1-June 30 tax year. But because the amount of the tax for carriers having to pay 5¢ per mile was computed on the basis of operations conducted during the previous tax year, carriers were given until August 31 to obtain and display the decal evidencing payment of the HUE tax. According to information provided to ATA by the Arkansas Highway and Transportation Department, approximately $18.5 million was collected during the months of June, July, and August of 1987.

2. In 1983, even before the HUE tax became effective, ATA instituted this class action challenging the tax on the ground that it impermissibly discriminated against interstate commerce in violation of the Commerce Clause. ATA sought prompt injunctive relief *pendente lite*, which was denied by the Arkansas courts (see App. I, *infra*). Thereafter, the Chancery Court of Pulaski County upheld the tax, and a divided Arkansas Supreme Court affirmed (Apps. G and H, *infra*). ATA appealed to this Court under 28 U.S.C. § 1257(2). The Court held the appeal (No. 87-358) pending its decision in ATA's simultaneously filed appeal in *Scheiner* (No. 87-357), which involved an identical constitutional challenge to Pennsylvania's two flat highway use taxes.

On June 23, 1987, this Court ruled that the Pennsylvania taxes violated the Commerce Clause because their measure was not proportionate to the extent of highway use. It noted that the "inevitable effect [of unappor-

tioned flat taxes] is to threaten the free movement of commerce" (107 S.Ct. at 2840), that the Pennsylvania taxes failed the "internal consistency" test for measuring the validity of state taxes challenged under the Commerce Clause (*ibid.*), and that "the taxes are plainly discriminatory" because, "[i]n practical effect, * * * they impose a cost per mile on [out-of-state] trucks that is [many times] as heavy as the cost per mile borne by local trucks" (*id.* at 2841).

On June 26, 1987, this Court vacated the judgment of the Arkansas Supreme Court in this case and remanded for further consideration in light of *Scheiner*. 107 S.Ct. 3252. ATA immediately inquired of Arkansas officials whether they intended to continue to enforce the HUE tax during the pendency of the remand proceedings, and the State responded that it would. In addition, the State refused to accept payments of the tax under protest and declared that, even if the HUE tax were to be held unconstitutional, it intended to assert a defense of sovereign immunity as a complete bar to any refund of those payments. In light of the State's position, ATA moved for immediate issuance of this Court's mandate, pursuant to Rule 52.2, so that it could seek injunctive relief against the HUE tax once the case returned to the Arkansas state courts. Over the State's opposition, Justice Blackmun granted ATA's motion, and the mandate issued on July 16, 1987. See App., *infra*, 10a.

3. That same day, with the Arkansas Supreme Court about to recess for the summer, ATA moved in that court for a remand to the Chancery Court so that it could promptly seek a preliminary injunction either to enjoin further collection of the HUE tax or to order an escrow of the taxes to be collected, pending a decision of the merits. In its application, ATA noted that the failure to act expeditiously would result in the collection of large sums of plainly unconstitutional taxes, which the State had indicated it would in no circumstance refund.

The State opposed the motion for a remand. It urged the Arkansas Supreme Court not to "dispos[e] of the issues in a hasty manner and without complete consideration of the issues raised," notwithstanding the court's impending recess and the fact that July and August were peak months for the payment of HUE taxes (see page 3, *supra*). Nevertheless, the Arkansas Supreme Court denied ATA's motion for a remand on July 20, 1987. App., *infra*, 15a.

On July 24, 1987, in light of the Arkansas Supreme Court's refusal to remand this case to the Chancery Court for further proceedings, ATA asked that court itself to grant injunctive relief in the form of an order requiring HUE tax payments to be escrowed pending a ruling on the constitutionality of the tax. In support of its application, ATA argued that its success on the merits was highly likely due to the substantial identity of the HUE tax and the Pennsylvania axle tax invalidated in *Scheiner*. It further contended that out-of-state truckers operating in Arkansas risked irreparable injury in the absence of temporary equitable relief: if they refused to pay the HUE tax pending a determination of its constitutionality, they would be barred from using the State's highways and would suffer devastating economic losses; on the other hand, if they paid the HUE tax there was a substantial risk, given Arkansas' stated intent to assert sovereign immunity and its refusal to accept HUE tax payments made under protest, that it would be impossible to obtain refunds once the tax was declared unconstitutional.

4. On July 30, 1987, the Arkansas Supreme Court entered an order (without opinion) denying ATA's application for temporary relief. App., *infra*, 14a. ATA thereupon immediately sought emergency injunctive relief from this Court. On August 14, 1987, Justice Blackmun, in his capacity as Circuit Justice, granted ATA's application and ordered that all further HUE tax payments be placed in escrow pending completion of the litigation.

App., *infra*, 13a. Justice Blackmun found that the HUE tax "works to deter interstate commerce" in a manner "substantially similar to that of the Pennsylvania unapportioned flat taxes invalidated in *Scheiner*" and that "ATA is likely to succeed on the merits of its challenge to the Arkansas HUE tax." *Id.* at 11a. Justice Blackmun further concluded that there was a risk of irreparable injury to the carriers represented by ATA, in light of the State's refusal to accept HUE tax payments made under protest and its planned assertion of sovereign immunity as a ground for refusing refunds. *Id.* at 12a.

5. On October 9, 1987, a special session of the Arkansas Legislature repealed the HUE tax and enacted a replacement tax at a rate of 2½ cents per mile, with no ceiling for extensive highway use. 1987 Ark. Acts 3 (Second Extraordinary Sess.). Under the new act, payment of the HUE tax for 1987-88 satisfies the carrier's 1987-88 replacement tax obligation; the effect of this is to perpetuate for another year the advantage given Arkansas-based operators by the flat HUE tax.

6. In an opinion issued on March 14, 1988 (App., *infra*, 1a-6a), the Arkansas Supreme Court decided the remand proceedings. It made short shrift of the question of the constitutionality of the HUE tax under *Scheiner*, striking the statute down and stating that it had "little doubt that the Supreme Court would hold that the HUE tax is unconstitutional" (*id.* at 3a).

The court then considered the question of petitioners' entitlement to refunds of HUE taxes paid during the pendency of the litigation, which it estimated to have been about $159 million up to the time of Justice Blackmun's escrow order and $4.9 million thereafter. Applying the test of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the Arkansas court held that *Scheiner* should not be given retroactive effect.

With respect to the first, or threshold, prong of the *Chevron* test, which is addressed to whether a decision works a sufficient change in the law that reliance on an

opposite rule was justifiable, the court below held that "a reasonable person could easily have found [the HUE tax] to pass Commerce Clause muster" on the basis of decisions of this Court from an earlier era upholding similar taxes (App., *infra*, 4a). With respect to the second prong of that test, which looks to whether retroactive application furthers the purposes of the new rule, the court asserted that prospective application would suffice to achieve the goal of free trade (*ibid.*). Finally, with respect to the third prong, which considers whether retroactive application of the new rule would be inequitable, the court noted that the tax revenues had already been expended and concluded that a full refund "would allow [petitioners] an unconscionable windfall far in excess of a fair recovery for the discrimination they may have suffered due to the tax" (*id.* at 4a-5a).[1]

Accordingly, the Arkansas Supreme Court denied any refund of tax payments for the pre-*Scheiner* period. And although it had acknowledged that the HUE tax was plainly unconstitutional under *Scheiner*, the court also permitted the State to retain most of the moneys collected for the post-*Scheiner* tax year, ordering refunds only of the escrowed funds. It explained this action on the basis that, after the August 14 escrow order, the State was "put on notice that the ATA's claims" were "likely to succeed on their merits" (App., *infra*, 5a). The court also observed (*ibid.*) that the escrowed funds had not been spent or, presumably, counted on for the future. Justice Hickman dissented with respect to the post-*Scheiner*, pre-escrow payments, observing that the ruling erroneously refused to give *Scheiner* even prospective effect (*id.* at 6a).

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[1] The court did not explain why this observation made it equitable to refuse a refund of even the discriminatory portion of the tax. This point was stressed in ATA's rehearing petition to the Arkansas Supreme Court, which argued (at 4-8) that the court's reasoning in this regard did not support a complete denial of refunds.

REASONS FOR GRANTING THE PETITION

This case presents two important questions involving the power of states to collect and retain unconstitutional taxes. The first involves the general and recurring issue of the application of retroactivity doctrine to decisions invalidating state taxes under the Commerce Clause or other provisions of federal law. The second involves the appropriateness of insisting upon prompt and scrupulous enforcement by the states of legal principles announced by this Court. A quick glance at the chronology of relevant events will bring these questions into focus:

- 1935-1950—This Court renders three decisions (the "*Aero Mayflower*" line of cases) sustaining the validity under the Commerce Clause of statutes imposing flat fees on operators of trucks and buses for the privilege of using the highways of the taxing states.[2]

- 1950-1980—Flat highway taxes apparently fall into disuse. (Every flat tax statute mentioned in the *Scheiner* opinion (see 107 S.Ct. at 2841 n.17) was enacted during the 1980s.)

- 1977-1981—A series of cases, including the seminal ruling in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and the subsequent decision in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), lays down the principles of modern Commerce Clause jurisprudence relied on in *Scheiner* to hold that taxes like the HUE tax are unconstitutional.

- 1983—Despite the warnings that *Complete Auto* and *Commonwealth Edison* provided to state lawmakers, Arkansas enacts the HUE tax. Even before the tax goes into effect, petitioners file suit challenging its constitutionality and seeking interim injunctive relief, relying on precisely the same grounds ultimately found in *Scheiner* to invalidate Pennsylvania's virtually identical flat highway tax.

- 1983-1987—The case gradually wends its way through the Arkansas courts to this Court. While this is happening, the State collects well over $100 million in HUE taxes.

- June 23, 1987—*Scheiner* is decided, and a few days later the instant case is remanded to the Supreme Court of Arkansas for reconsideration in light thereof.

- June 23-August 14, 1987—Arkansas announces that it will continue to enforce the HUE tax during the coming tax year, beginning July 1. The Arkansas Supreme Court, at the State's urging, rebuffs ATA's efforts to obtain interim relief or expedited consideration of the constitutionality of the HUE tax, and a substantial proportion of total July 1987-June 1988 HUE taxes are collected during this period.

- August 14, 1987—Justice Blackmun enters an order requiring that all further HUE tax collections be placed in escrow. Two months later, the HUE tax is repealed and replaced.

As this chronology shows, Arkansas paid little heed when it enacted the HUE tax to its duty under the Commerce Clause to avoid discriminatory taxation, and followed up that indifference with a stubborn refusal, rewarded by the Arkansas Supreme Court, to acknowledge the inescapable consequence of *Scheiner* that the HUE tax was invalid.

This conduct is of a piece with a variety of other state legislative actions and judicial decisions reflecting indifference to the unconstitutionality of discriminatory taxes and a steadfast determination to avoid refunds of such taxes after they have been finally invalidated. For instance, Vermont has passed a series of discriminatory truck taxes, putting new ones in place as rapidly as the

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[2] *Aero Mayflower Trans. Co.* v. *Georgia Pub. Serv. Comm'n*, 295 U.S. 285 (1935); *Aero Mayflower Trans. Co.* v. *R.R. Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 452 (1950).

old ones are struck down,[3] while Florida has done the same with liquor taxes.[4] These legislative tendencies are

[3] In 1986, the Supreme Court of Vermont held invalid a system of entry fees imposed on trucks base-registered outside Vermont. *American Trucking Ass'ns, Inc.* v. *Conway*, 508 A.2d 408, cert. denied, 107 S.Ct. 3262 (1987). That system imposed a $50 truck decal tax, but bestowed a facially discriminatory offset in registration fees on Vermont truckers. And apart from the offset, the $50 flat fee resulted in a lower cost per mile for Vermont truckers precisely parallel to the unconstitutional discrimination produced by the flat rate taxes in *Scheiner* and in this case.

Immediately after the Vermont court's decision, the legislature eliminated the facially discriminatory offset but otherwise reenacted the $50 flat tax. See 1986 (Adj. Sess.) No. 124, amending Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010. ATA thereafter successfully sought an escrow of the revenues collected under this plainly unconstitutional statute, and its attempt to obtain a refund of taxes paid is now before the Vermont Supreme Court. See *American Trucking Ass'ns, Inc.* v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶200-306 (Vt. Super. Ct., Washington Co., Feb. 11, 1988), notice of appeal filed, No. 88-156 (Vt. Mar. 11, 1988). The Vermont legislature likewise reenacted with slight amendment a discriminatory $10-per-entry charge. See Vt. Stat. Ann. tit. 23, § 417(a). Again, ATA was forced to obtain an escrow and engage in litigation over an obviously void tax. See *American Trucking Ass'ns, Inc.* v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶ 200-287 (Vt. Super. Ct., Washington Co., May 4, 1987), notice of appeal filed, No. 87-300 (Vt. June 3, 1987).

[4] Prior to this Court's decision in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), Florida's alcoholic beverage laws granted an excise tax exemption to beverages manufactured and bottled in Florida from Florida products. After *Bacchus*, which invalidated under the Commerce Clause a parallel Hawaii local beverage exemption, the Florida legislature amended the exemption by removing the word "Florida" from the statute, while describing eligibility for favored tax treatment in terms applicable almost exclusively to Florida products. See *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco*, 524 So.2d 1000 (Fla. 1988), pet. for cert. pending, No. 88-192 (filed July 30, 1988). After the Florida Supreme Court struck down this statute under the Commerce Clause while denying any refund remedy, the Florida legislature adopted yet another alcoholic beverage excise tax system, which continues to tax beverages produced outside Florida at a rate many times higher than those produced in Florida. See 88-192 Pet. 2, 5, 8-9.

encouraged by the widespread practice of state courts to decline to give retroactive (or, as here, even full prospective) effect to decisions striking down state taxes on federal constitutional grounds,[5] or to invoke sovereign immunity as a basis for refusing refunds.[6]

This case provides an excellent vehicle for this Court to give guidance to legislatures, state courts, and taxpayers regarding the proper analysis of non-retroactivity principles in the context of state taxes that violate the Commerce Clause or other provisions of federal law.

I. THE ISSUE OF THE RETROACTIVITY OF *SCHEINER* TYPIFIES IMPORTANT AND RECURRING QUESTIONS OF COMMERCE CLAUSE JURISPRUDENCE

In recent years Commerce Clause challenges to state tax statutes have been a staple of this Court's docket, with the frequent result that state taxes have been struck down on the ground that they discriminated impermissibly against out-of-state taxpayers or activities.[7] These

[5] See, *e.g.*, *McKesson Corp.*, *supra*; *National Can Corp.* v. *Department of Revenue*, 749 P.2d 1286 (Wash.), appeal dism'd and cert. denied, 108 S.Ct. 2030 (1988); *Ashland Oil, Inc.* v. *Rose*, 350 S.E.2d 531 (W. Va. 1986), appeal dism'd for lack of jurisdiction, 107 S.Ct. 1949 (1987); *Salorio* v. *Glaser*, 461 A.2d 1100 (N.J.), cert. denied, 464 U.S. 993 (1983).

[6] See *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d 408, cert. denied, 107 S.Ct. 3262 (1987); *Continental Trailways, Inc.* v. *Director, Div. of Motor Vehicles*, 509 A.2d 769 (N.J. 1986), cert. dism'd per stipulation, 107 S.Ct. 1636 (1987); *Private Truck Council of America, Inc.* v. *Secretary of State*, 503 A.2d 214 (Me.), cert. denied, 476 U.S. 1129 (1986).

[7] In addition to *Scheiner*, see, *e.g.*, *New Energy Co.* v. *Limbach*, 108 S.Ct. 1803 (1988); *Tyler Pipe Indus.* v. *Washington Dep't of Revenue*, 107 S.Ct. 2810 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388 (1984); see also *Exxon Corp.* v. *Hunt*, 475 U.S. 355 (1986) (state tax preempted by federal statute); *Williams* v. *Vermont*, 472 U.S. 14 (1985) (state tax invalid under Privileges and Immunities Clause); *Metropolitan*

decisions enforce a core purpose of the Commerce Clause to encourage free trade among the states by protecting against the strong incentive that each state has to shift the costs of local government to outsiders.[8] There is every reason to suppose that challenges to the validity of state taxes under federal law will remain an important part of this Court's docket in the future.[9]

Naturally enough, if a tax is found to be invalid, the question is likely to arise whether past payments of such a tax must be refunded. This Court has itself acknowl-

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Life Ins. Co. v. *Ward*, 470 U.S. 869 (1985) (same under Equal Protection Clause); *ASARCO, Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307 (1982) (same under Due Process Clause). See generally *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980) ("The effect of the Commerce Clause on state taxation of interstate commerce is a frequently litigated subject that appears to be undergoing a revival of sorts.") (footnote omitted).

[8] See, *e.g.*, *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 46 n.2 (1940) (discussing the "recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state"); *Nippert* v. *Richmond*, 327 U.S. 416, 434-435 (1946) ("Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against"); *United States* v. *County of Fresno*, 429 U.S. 452, 458-459 (1977); R. Posner, *Economic Analysis of Law* 602 (3d ed. 1986); L. Tribe, *American Constitutional Law* § 6-5 at 411 (2d ed. 1988).

[9] Seven state tax cases await decision by this Court in the coming term. *Amerada Hess Corp.* v. *Director, Div. of Taxation*, Nos. 87-453, 87-464; *Goldberg* v. *Sweet*, Nos. 87-826, 87-1101; *Shell Oil Co.* v. *Iowa Dep't of Revenue*, No. 87-984; *Davis* v. *Michigan Dep't of Treasury*, No. 87-1020; *Texas Monthly Inc.* v. *Bullock*, No. 87-1245; *Allegheny Pittsburgh Coal Co.* v. *County Comm'r*, Nos. 87-1303, 87-1310; *Cotton Petroleum Corp.* v. *New Mexico*, No. 87-1327. Although several of these cases involve challenges based on provisions of federal law other than the Commerce Clause, invalidation of a tax on any federal law ground will likely give rise to remedial issues that parallel those raised by this case.

edged this issue on various occasions, but it has not, in declaring a tax unconstitutional, undertaken to decide at the same time whether its rulings should be applied retroactively. Rather, recognizing that "the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law" (*Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276-277 (1984)), the Court has left decision of the retroactivity issue to the state courts in the first instance. See, *e.g.*, *Scheiner*, 107 S.Ct. at 2847-2848; *Tyler Pipe Indus.* v. *Washington Dep't of Revenue*, 107 S.Ct. 2810, 2822-2823 (1987).

Perhaps not surprisingly, state courts have almost uniformly resolved that issue in favor of their state treasuries by holding that, as a matter of federal law, decisions invalidating state taxes under the Commerce Clause are limited to prospective application. See note 5, *supra*. As a result, out-of-state companies that were unconstitutionally taxed have been denied any remedy, and a climate has been fostered in which states feel free to legislate and to administer their tax laws without taking due care to avoid violations of federal law.

This growing line of state court decisions reflects a systemic problem of substantial public importance that warrants this Court's review. See Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103, 118 (1987). Narrowly conceived, the question presented is whether these decisions have faithfully applied the Court's retroactivity analysis in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). More broadly, however, what is at stake is whether the Commerce Clause principle of nondiscrimination will be frustrated in practice by the actions of state legislators and judges that sacrifice the interests of interstate commerce for those of the state fisc and in-state taxpayers. The inherent pressures for states to impose an unfair share of the tax burden on out-of-state busi-

nesses, which the Court has struggled to restrain in its substantive decisions under the Commerce Clause, must also be guarded against in a proper retroactivity analysis. Indeed, insofar as the Tax Injunction Act (28 U.S.C. § 1341) restricts taxpayers' access to United States district courts, this Court is the only federal tribunal that can pass on the retroactivity issue.

The issue of the retroactivity of Commerce Clause decisions invalidating state taxes has not only substantial jurisprudential significance, but also unusually great practical, dollars-and-cents importance because of the amounts of money that such taxes typically raise. The retroactivity of *Scheiner* alone is being litigated in five states and involves claims for restitution of several hundred million dollars in unconstitutional flat highway taxes.[10] Thus, the business community and state tax authorities have an enormous practical need for guidance from this Court.

Moreover, as we next show in discussing the application of the three *Chevron* factors, this case typifies many of the problems that are likely to arise when considering whether state tax invalidations should be limited to prospective effect; it therefore offers the Court an excellent opportunity to provide guidance of broad utility to future litigants.[11]

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[10] In addition to Arkansas and Pennsylvania, refund litigation is also pending in Kentucky, New Jersey, and Vermont.

[11] A related retroactivity issue is presented by the petition in *McKesson Corp.*, *supra*, No. 88-192. The question there is whether the Florida Supreme Court correctly limited to prospective application its decision invalidating a discriminatory state tax under the principles of *Bacchus*, *supra*. Because the retroactivity question in *McKesson* involves a decision on "an issue of first impression" rather than an "overruling * * * [of] past precedent" under *Chevron* (404 U.S. at 106), it is a natural complement to the question presented here.

In *National Can Corp.* v. *Washington Dep't of Revenue*, appeal dism'd for want of jurisdiction and cert. denied, 108 S.Ct. 2030 (1988), three Justices voted to grant review on the question of the retroactivity of *Tyler Pipe*, which had invalidated an exemption contained in Washington's B&O tax. As discussed in text, the present case is for several reasons a far better vehicle for review of the retroactivity issue than was *National Can*.

1. The Foreseeability Of The *Scheiner* Decision

It is a general principle of long standing that the rule of law announced by a judicial decision normally has retroactive effect. See, *e.g.*, *Saint Francis College* v. *Al-Khazraji*, 107 S.Ct. 2022, 2025 (1987); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). In a narrow range of circumstances, however, this Court has held that some decisions establishing a "new" rule of law should not be applied retroactively to later cases in which the operative facts arose before the date of the decision setting forth the new rule. The governing test for non-retroactivity in civil cases is stated in *Chevron*, 404 U.S. at 106-107. See *Griffith* v. *Kentucky*, 107 S.Ct. 708, 713 n.8 (1987). Under *Chevron*, "[t]he presumption [is] strongly in favor of retroactive application." *EEOC* v. *Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988).

For a decision to have only prospective effect, it first "must establish a new principle of law" (*Chevron*, 404 U.S. at 106). In cases like *Scheiner* that involve the continued vitality of earlier rulings, this requirement means that the decision must "overrul[e] clear past precedent on which litigants may have relied" (*ibid.*). As this Court has explained, this "'clear break' principle * * * [is a] threshold test for determining whether or not a decision should be applied nonretroactively." *United States* v. *Johnson*, 457 U.S. 537, 549 n.12 (1982). The rationale for this element of the *Chevron* test is readily apparent: it is meant to identify those instances in which retroactive application of a new principle would upset settled and justifiable expectations, for only then might the normally overriding societal interest in applying the correct rule of law be outweighed.

When this Court decided *Scheiner*, it declined to apply the old *Aero Mayflower* line of cases, which it characterized as embodying an outmoded analysis that had been thoroughly discredited in modern Commerce Clause jurisprudence, most notably the 1977 ruling in *Complete Auto*.[12] At the time of the *Scheiner* decision, a total of seven states, including Pennsylvania and Arkansas, imposed one form or another of discriminatory flat highway tax on trucks; every one of these was enacted well after the decision in *Complete Auto*. See *Scheiner*, 107 S.Ct. at 2841 & n.17.

Had Arkansas and her sister states given due consideration to the constitutionality of these new taxes when they enacted them, they would have seen that they presented serious problems under the Commerce Clause. On the one hand, the attributes of these taxes—that they lacked a fair relation to the extent of highway use within the taxing state and were bound to lead to actual and substantial discrimination in favor of local truckers and against interstate operators—made them highly suspect under the principles of *Complete Auto* and the 1981 decision in *Commonwealth Edison* (see *Scheiner*, 107 S.Ct. at 2844). On the other hand, the *Aero Mayflower* line of cases had upheld similar taxes 40 years earlier and had never been formally overruled.

These circumstances pose a paradigmatic question: who should bear the risk of loss associated with enactment of a constitutionally dubious state tax law, the taxpayer or the state? We think the Supreme Court of New

[12] *Scheiner* disposed of the *Aero Mayflower* cases as relics of "the pre-*Spector* era" (107 S.Ct. at 2833, citing *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), which was overruled in *Complete Auto*). Noting that "recent decisions * * * have rejected th[e] somewhat metaphysical approach to the Commerce Clause" represented by *Spector* (*id.* at 2846), the Court stated that the *Complete Auto* analysis had "*necessarily called into question the future vitality* of [the *Aero Mayflower* cases] that had upheld facially neutral flat taxes" (*ibid.*; emphasis added).

Jersey got it right in *Exxon Corp.* v. *Hunt*, 534 A.2d 1, 8 (1978):

> The purpose of the *Chevron* test is the avoidance of prejudice arising from judicial decisions that interested parties could not fairly have anticipated. In this case the issue of statutory interpretation was susceptible to either of two resolutions, one advanced by the State and the other advanced by the plaintiffs. The [United States Supreme] Court's holding that CERCLA partially preempted the Spill Act was not sufficiently unpredictable to satisfy this aspect of the *Chevron* criteria.

The court below took precisely the opposite view: a state's reliance on an erroneous forecast about the validity of a problematical tax should be deemed justified if "a reasonable person could easily have found [the tax] to pass Commerce Clause muster * * *" (App., *infra*, 4a). And the Supreme Court of Florida in the *McKesson* case suggested, in a similar vein, that collection of such a tax is justified by the presumptive validity of any tax enacted by the legislature. See 88-192 Pet. App. 21a.[13]

It is important for this Court to consider whether such lax standards for satisfying *Chevron*'s threshold test are

[13] Whether the situation involves putative reliance upon questionable but not yet overruled old cases, as here, or upon arguably tenable but not yet approved approaches, as in *Exxon* and *McKesson*, the underlying question must be the same: does the ruling of unconstitutionality upset reasonable expectations upon which the state justifiably relied?

This case is in this respect a far cry from *National Can*, *supra*. The multiple activities exemption to the Washington B&O tax invalidated in *Tyler Pipe* was enacted in 1950 and had been upheld by this Court (as well as by the Washington courts) on several occasions, including as recently as 1983, when the taxpayer's appeal in *Chicago Bridge & Iron Co.* v. *Washington Dep't of Revenue* was dismissed for want of a substantial federal question (464 U.S. 1013). In that situation, the reasonableness of Washington's enactment of the multiple activities exemption could not possibly be questioned, and the State accordingly had a strong claim of justifiable reliance on this Court's continued and recent decisions upholding its tax.

appropriate. Certainly they are not easy to square with prior explanations of the test offered by this Court. Prospective-only application requires a "'clear break'" (*Johnson*, 457 U.S. at 549 n.12) with "clear past precedent" (*Chevron*, 404 U.S. at 106) on which a party was "entitled to rely" (*Saint Francis College*, 107 S.Ct. at 2025). The threshold was crossed in *Chevron* because the shortened statute of limitations adopted by the nonretroactive case "was quite unforeseeable" (404 U.S. at 108).[14] Here, by contrast, it was quite likely that the Court would hold flat highway taxes incompatible with the requirements of the Commerce Clause, as construed in *Complete Auto* and *Commonwealth Edison*.

The state courts' allocation of risk of error in cases involving unconstitutional state taxes is also dramatically at odds with the treatment of the closely related problem of municipal liability under 42 U.S.C. § 1983. In *Owen* v. *City of Independence*, 445 U.S. 622 (1980), the Court recognized that awards of monetary relief against municipalities for constitutional violations would not only "create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights" (*id.* at 651-652), but also would "allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, * * * [rather than] solely by those whose rights, albeit newly recognized, have been violated" (*id.* at 655).

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[14] See also *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 488 (1986) (Stevens, J., concurring) (retroactivity is appropriate for any decision that was "presaged in * * * well-established precedent"); *id.* at 494 (Powell, J., dissenting) (retroactivity is not justified when "the decision had not been foreshadowed"); *Carter* v. *City of Chattanooga*, No. 84-5247 (6th Cir. June 27, 1988) (en banc), slip op. 7 ("a new rule of law [should not be] impose[d] on parties who had no significant reason to doubt the availability or constitutionality of a statute or practice"); Tatarowicz, *supra*, 41 Tax Lawyer at 141.

The Court's reasoning in *Owen* applies equally to the prospectivity issue in Commerce Clause cases. Unless a decision is a clear and unforeseeable break with past law, retroactive application is appropriate to encourage state officials to give due weight to interests of national free trade when those interests clash with parochial local concerns and to reallocate the financial consequences of unconstitutional discrimination from out-of-state taxpayers to the state's broader tax base. If there existed a substantial possibility that a state tax would be invalidated under federal law—that is, if the issue was fairly "susceptible to either of two resolutions" (*Exxon Corp.*, 534 A.2d at 8)—the state should not be permitted to avoid the usual legal obligation to return money unconstitutionally collected (see *Carpenter* v. *Shaw*, 280 U.S. 363 (1930); *Ward* v. *Love County*, 253 U.S. 17 (1920)) by claiming justifiable reliance upon an erroneous assessment of the validity of the tax.

2. Retroactive Application And Commerce Clause Policies

The second *Chevron* factor is whether retroactive application "will further or retard [the policies underlying] * * * the rule in question" (404 U.S. at 107)—here, the protection of free trade among the states and the avoidance of discrimination against interstate commerce. The Arkansas Supreme Court, quoting *National Can*, found it "'difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate trade is in the past'" (App., *infra*, 4a). Such reasoning, if correct here, would always be true in Commerce Clause cases; the theory that the Commerce Clause is indifferent to a state's retention of unconstitutional taxes is a categorial ground in favor of non-retroactivity—and one that requires close scrutiny by this Court.[15]

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[15] There are critical differences in this respect between the instant case and *National Can*. In *National Can*, the flaw in the tax was "the risk of multiple taxation" arising from the failure to meet

In fact, here and in many other state tax contexts, retroactivity will promote Commerce Clause values in two ways. See Tatarowicz, 41 Tax Lawyer at 119, 141-142. First, limiting *Scheiner* to prospective application would do nothing to remedy the unconstitutional discrimination against out-of-state taxpayers that has already occurred. The unfair burden that was placed on out-of-state truckers, and the resulting competitive benefit to Arkansas-based truckers, would go unredressed. Likewise, every tax dollar unlawfully exacted would remain in the State's coffers, so that the State would have succeeded for five years in shifting an unfair share of its tax burden to outsiders. We therefore see little basis for doubting that Commerce Clause interests would be advanced by righting the competitive scales between in-state and out-of-state truckers.

Second, and perhaps more important, denial of retroactive application to cases like *Scheiner* surely jeopardizes the constitutional interest in preventing future violations of the Commerce Clause by removing the incentives state legislators otherwise would have to avoid discriminatory taxation of interstate commerce. See *Nippert* v. *Richmond*, 327 U.S. 416, 434 (1946) ("[t]he problem comes down therefore to whether the state or municipal legislative bodies in framing their tax measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause").

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the requirement of internal consistency, and an acceptable cure was the provision of a credit for taxes paid to other states. See *Tyler Pipe*, 107 S.Ct. at 2820. But because few if any taxpayers were actually subject to multiple taxation, the plaintiffs would have paid virtually the same amount of tax even under a constitutional version of the tax. See *National Can*, 749 P.2d at 1292. A grant of refunds in that circumstance would truly involve a windfall. By contrast, in this case there is a "conceded" (App., *infra*, 2a) disparity of more than 3:1 in the tax burdens of in-state and out-of-state truckers; thus, petitioners undeniably paid tens of millions of dollars more than they would have under a nondiscriminatory tax.

Under the decision below, non-retroactivity will be the norm rather than the infrequent exception. In that situation, any impulse state legislators have to enact constitutionally questionable taxes that favor in-state over out-of-state taxpayers will be reinforced by the knowledge that such preferences would be not only politically advantageous but economically cost-free. See notes 3, 4 & 8, *supra*, and accompanying text.

In *Owen* v. *City of Independence*, 445 U.S. at 651-652, the Court noted that monetary relief "serve[s] as a deterrent against future constitutional deprivations" and provides an "incentive" for government officials "to err on the side of" complying with the Constitution. "Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury" (*id.* at 656). The same analysis is applicable here. Such an incentive structure is especially appropriate in this area, given the powerful political pressures to discriminate against out-of-state taxpayers and the fact that the monetary relief at issue is simply restitution of taxes that were unconstitutionally obtained. Accordingly, Commerce Clause policies clearly support the retroactivity of *Scheiner*.

3. Equitable Considerations

The final *Chevron* factor is whether retroactive application would produce " 'substantial inequitable results' " (404 U.S. at 107). Here again, the mode of analysis employed by the court below and by other courts that refuse to give retroactive application to decisions invalidating state taxes under federal law is deeply troubling and represents a clear road map to the routine denial of monetary restitution to victims of unconstitutional taxation.

The Arkansas Supreme Court relied on two factors—first, that the tax moneys had been expended for the benefit of the public, including petitioners; second, that

award of a full refund would give petitioners "an unconscionable windfall" because it would exceed the amount of any discriminatory injury they suffered. App., *infra*, 5a. Both of these assertions embody a peculiar and, we submit, unacceptable construction of the equity factor.

It is far from clear why the fact that the unconstitutional tax proceeds have been "spent" or "counted on for the future" (App., *infra*, 5a) should defeat retroactivity. Surely the fact that an unconstitutional fine or civil penalty had been spent by the state while its validity was being litigated would never justify a refusal to refund it. No explanation is offered why taxes should be different, especially when the defect in the tax is actual, unlawful discrimination that causes a disfavored class of taxpayers to pay more than their share while a favored group pays less. And even if refunding the ill-gotten tax revenues would be *burdensome* for the state, which the court below did not find, it hardly follows that requiring it to do so would be *inequitable*.

The defect in the court's reasoning is especially clear where, as here, the tax in question is a user fee rather than a general revenue measure. In this case, maintenance of the State's highways—an objective that out-of-state truckers desire no less than in-state truckers—can be fully funded by other, nondiscriminatory highway taxes imposed on all truckers, including petitioners, in fair proportion to the wear and tear they actually cause to the State's roads. See *Scheiner*, 107 S.Ct. at 2847 & n.27. And so can refunds. Ultimately, not one cent of the refunds need come from the pockets of the State or its non-trucker taxpayers; rather, they can be financed by new taxes, fairly shared by in-state and out-of-state truckers.

The second "equitable" consideration adduced by the court below—that a full refund would confer a "windfall" for petitioners "far in excess of a fair recovery for the discrimination they may have suffered due to the tax"

(App., *infra*, 5a)—is especially pernicious. To begin with, the court's premise is utterly unfounded. As Justice Blackmun noted in granting the escrow, the out-of-state truckers paid more than three times as much tax per mile as the Arkansas-based truckers did (*id.* at 11a). Accordingly, the "discrimination component" of the HUE tax payments represented more than two-thirds of the total, and full refunds would exceed only slightly the amount of actual injury. The situation is thus wholly unlike in *National Can*, where the taxpayers could invoke little more than a theoretical risk of discrimination. See note 15, *supra*.

But even if full refunds would result in a significant windfall, any problem that entails cannot be laid at petitioners' door. They simply invoked the remedy provided by Arkansas law for an illegally exacted tax, which is a refund. See *City of Little Rock* v. *Cash*, 277 Ark. 494, 513, 644 S.W.2d 229, 237 (1982), cert. denied, 462 U.S. 1111 (1983); *Streight* v. *Ragland*, 280 Ark. 206, 209 n.6, 655 S.W.2d 459, 461 n.6 (1983). Certainly, the assertion that a full refund would include a windfall component wholly fails to justify the denial of any relief whatever.

Petitioners do not argue that federal law requires a refund of the total HUE tax paid. Indeed, in response to the court's reasoning, petitioners urged—to no avail—that the court should at least order refunds equalling the excess payments due to the unlawful discrimination. Pet. for Rehearing 7-8. In that way out-of-state taxpayers would be charged their fair share, but no more, for their "use[] [of the] Arkansas highways" (App., *infra*, 4a).

The Arkansas Supreme Court's reasoning also raises the prospect of increased judicial intrusion into state taxing systems. Insofar as payment of unconstitutional taxes into a state treasury weighs against retroactivity, courts will be more likely to award preliminary injunctive relief restraining the collection or at least the expenditure of the tax, in order to preserve a refund rem-

edy if the taxpayer prevails. *See Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1929). In fact, Justice Blackman entered just such an injunction in the case (though too late to protect most of petitioners' tax payments). Furthermore, absent the prospect of a refund remedy, state law arguably would no longer provide a "plain, speedy and efficient remedy" (28 U.S.C. § 1341), freeing federal courts from the constraint of the Tax Injunction Act. These consequences could prove more injurious to the states than the requirement to refund unconstitutional taxes that were of dubious provenance when enacted. Injunctions or even escrow orders could leave revenue needs unmet and might thereby force a state's abandonment of a challenged tax whose constitutionality might ultimately have been sustained.

II. ARKANSAS WAS NOT ENTITLED TO CONTINUE TO COLLECT THE HUE TAX IN DISREGARD OF ITS PLAIN INVALIDITY UNDER THIS COURT'S DECISION IN *SCHEINER*

Even if the court below were correct in ruling that *Scheiner* embodied a new principle of law that ought properly be denied retroactive application, there can be no justification—and the Arkansas Supreme Court tendered none—for the refusal to give *prospective* effect to *Scheiner* with respect to Arkansas' efforts to exact the tax for highway use during the tax year that began *after* the date of the *Scheiner* decision.[16] The decision below conflicts in this respect with the ruling by the highest court of Maryland in *American Trucking Associations,*

[16] Some payments for the tax year beginning July 1, 1987, were made before the date of the *Scheiner* decision, but most were made after that date. We believe that the duty to give *Scheiner* prospective effect relates to both categories of payments and turns on when the transactions being taxed—use of Arkansas' highways—took place. It might be argued, alternatively, that pre-*Scheiner* payments for the post-*Scheiner* tax year should be covered by a non-retroactivity ruling. Which of those views is correct has little bearing on the present issue—whether Arkansas' refusal to give prompt effect to *Scheiner* should be reviewed by this Court.

Inc. v. *Goldstein*, 541 A.2d 955 (1988) (see pages 28-29, *infra*). This Court should review whether Arkansas was justified in refusing to give prompt implementation to the constitutional principles set forth by *Scheiner.*

ATA's appeal of the decision of the Arkansas Supreme Court upholding the constitutionality of the HUE tax was held by this Court pending the decision in ATA's simultaneously filed appeal in *Scheiner*; three days after *Scheiner* was decided, the judgment in this case was vacated and the case remanded for reconsideration in light of *Scheiner.* See *American Trucking Associations, Inc.* v. *Gray*, 107 S.Ct. 3252 (1987). At that time, Arkansas was in the process of collecting HUE tax payments for the tax year beginning on July 1, 1987 (eight days *after* the *Scheiner* decision). While truckers subject to the HUE tax were given until August 31, 1987, to display decals evidencing payment for the 1987-88 tax year, the logistics of obtaining the decals, distributing them to far-flung fleets, and affixing each decal to its proper vehicle are sufficiently time-consuming that a substantial part of the approximately $30 million in annual HUE tax payments was paid between the time of the *Scheiner* decision and mid-August, when Justice Blackmun ordered all further HUE tax collections escrowed. 108 S.Ct. 2 (1987).

That the HUE tax was doomed by *Scheiner* is beyond serious dispute, since it was materially indistinguishable from the Pennsylvania axle tax invalidated in that case. Pennsylvania's tax was assessed at a rate of 9¢ per mile up to a maximum flat rate of $180 (2,000 miles); Arkansas' HUE tax rate was 5¢ per mile up to a maximum flat rate of $175 (3,500 miles). Both taxes violated the internal consistency principle that was at the heart of the *Scheiner* decision, since their replication by other states would inevitably cause interstate truckers to suffer far heavier tax burdens for the same level of highway use than would be experienced by truckers who operated largely or exclusively within Pennsylvania or within

Arkansas. Moreover, both taxes were shown to have actual discriminatory impact, costing typical out-of-state truckers many times as much per mile of operation within the State as they cost in-state truckers. Compare 107 S.Ct. at 2841 with App., *infra*, 11a.

What was Arkansas' response to the decision in *Scheiner* and the remand in *Gray* and to petitioners' efforts to obtain a speedy end to the plainly invalid HUE tax? Justice Blackmun described it in his August 14 order requiring that HUE tax collections be escrowed (App., *infra*, 12a):

> Arkansas officials have expressed their intention to continue collecting the HUE taxes during the pendency of the case and have refused to accept payment of the taxes "under protest." Motor carriers operating interstate must pay the annual HUE tax by August 31. If motor carriers refuse to pay the tax pending a determination of its constitutionality, they will be barred from the State's highways and will suffer substantial economic losses. On the other hand, if motor carriers pay the tax, there is a substantial risk that they will not be able to obtain a refund if the tax ultimately is declared unconstitutional. Applicants assert [and respondents have not denied] * * * that the Arkansas Highway Department has informed them that, should the tax be invalidated, the State will assert immunity from any subsequent refund order.

As for the Arkansas Supreme Court, it denied petitioners' motion to remand to the Chancery Court so that prompt relief could be sought there, denied a motion requesting that it order an escrow pending decision in the case, and went home for the summer (see App., *infra*, 10a). When, in March 1988, the Arkansas Supreme Court finally did address the remanded case, it candidly acknowledged that, in light of *Scheiner*, there was "little doubt that the Supreme Court would hold that the HUE tax is unconstitutional." App., *infra*, 3a.

Nevertheless, the court permitted the State to retain the bulk of the unconstitutional taxes collected for the

1987-88 post-*Scheiner* tax year, granting refunds only of the considerably smaller amounts that were paid after the escrow was established. The latter date was said to be the time "when the [State was] put on notice that the ATA's claims were ones which were likely to succeed on the merits" (App., *infra*, 5a). It seems quite evident that, had Justice Blackmun not issued an escrow order, the Arkansas Supreme Court would have permitted the State to retain all taxes collected until the date it finally got around to issuing its own opinion applying *Scheiner* to the HUE tax.

Assuming for present purposes that the court below was correct in holding that *Scheiner* should not be given retroactive effect (but see Point I, *supra*), that hardly justifies the radically different result of permitting the State to exact and retain the plainly invalid HUE tax for highway use during the year *after* the decision in *Scheiner*.[17] That part of the Arkansas Supreme Court's ruling amounts to nothing short of a refusal to give *prospective* effect to *Scheiner*. This was recognized by Justice Hickman in dissent below, who stated that "[i]f the United States Supreme Court's decision in * * * *Scheiner* * * * is to be applied prospectively, then the refund should be made from the date of that decision, or certainly no later than when we were asked, in July 1987, to place the funds in escrow." App., *infra*, 6a.

It is well settled that a new principle of law, if nonretroactive, is effective on the date that the decision announcing it is "handed down." *Shea* v. *Louisiana*, 470 U.S. 51, 57 (1985); *id.* at 61 (White, J., dissenting).

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[17] Arkansas' determination to persist for as long as possible with its highway tax discrimination against out-of-state vehicles has not been confined to the executive and judicial branches. When Arkansas enacted its 2½¢ per mile replacement tax, it exempted for the first year those who had paid the HUE tax. As a consequence, high-mileage users of the State's highways (mostly Arkansas-based operators) retain the benefit of the flat tax, and the discrimination against less frequent users (mostly non-Arkansas-based operators) has been perpetuated for another year.

See also *id.* at 55 n.3 (date landmark decision was "announced"); *United States* v. *Johnson*, 457 U.S. at 542-543; *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 214 (1970) (prospective decision in civil case effective "as of June 23, 1970, the date of this decision"). In the case of the prohibition of flat highway taxes, that date was June 23, 1987. If a tax is invalid under *Scheiner*, there is simply no basis for allowing it to be collected and retained from June 23, 1987 forward, with respect to a tax year beginning after that date.

As discussed more fully in the preceding point, the threshold requirement of the *Chevron* test for non-retroactivity is that the decision in question embody a new principle of law. The opinion of the Arkansas Supreme Court might be read to suggest that the date of Justice Blackmun's escrow order is the appropriate one for non-retroactivity purposes because it was his accompanying opinion that "put [the State] on notice" that the HUE tax was likely to be held invalid. If this was the court's meaning, it is flatly erroneous. As discussed above (pages 25-26, *supra*), the fate of the HUE tax was unmistakably sealed by the *Scheiner* decision. Certainly Justice Blackmun's opinion gives no suggestion that he believed he was announcing a new rule of law. Thus, whatever may be said as to whether *Scheiner* should be non-retroactive, there is no tenable argument that Justice Blackmun's escrow ruling (or any other post-*Scheiner* decision) lays down a new legal principle and can be used to establish a non-retroactivity date that is later than June 23, 1987.

The decision below conflicts with the ruling of Maryland's highest court on the right of that State to collect and retain its flat highway tax with respect to post-*Scheiner* highway use. *American Trucking Associations, Inc.* v. *Goldstein*, 541 A.2d 955 (Ct. App. 1988). The trial court in *Goldstein* had invalidated Maryland's flat $25 decal tax as not materially distinguishable from the Pennsylvania marker fee struck down in *Scheiner*, but had

permitted the State to continue to collect the tax through June 30, 1988. The Court of Appeals reversed, holding that the non-retroactivity principles of *Chevron* could not justify a refusal to refund taxes relating to "operative events occurring after the date of the [*Scheiner*] decision" (541 A.2d at 959). Such an outcome, the court recognized, would amount to a refusal to give this Court's decision *prospective* effect, something that could be done, if at all, only in the most extraordinary circumstances of a kind plainly not present in this sort of case. *Id.* at 959-962.

In sum, this aspect of the case involves an egregious violation of the principle that the decisions of this Court must be followed by the courts of the states. See, *e.g.*, *Stanton* v. *Stanton*, 429 U.S. 502, 503 (1977) (summary reversal of a decision that "obviously" was "inconsistent with our opinion in" a prior proceeding); *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731, 732 (1967) ("We granted certiorari because it appeared that, in deciding as they did, the Louisiana courts had failed to follow our holding in" a prior case.). The Arkansas Supreme Court had "little doubt" (App., *infra*, 3a) that, under the principles of *Scheiner*, this Court would hold the HUE tax unconstitutional. That being so, it was entirely improper for it to countenance continued enforcement of that tax with respect to post-*Scheiner* highway use. This Court should grant review in order to make clear that state governments must give immediate effect to its constitutional rulings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1988

APPENDICES

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 85-101

AMERICAN TRUCKING ASSOCIATION, INC., *et al.*,
Appellants

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Appellees

Opinion delivered: Mar. 14, 1988

UPON REMAND FROM THE UNITED STATES SUPREME COURT

Appeal from Pulaski County Chancery Court, Fourth Div.

HONORABLE BRUCE T. BULLION, Chancellor

DAVID NEWBERN, *Justice*

The appellants, American Trucking Associations, Inc., et al., (ATA) challenged the constitutionality of Act 685 of 1983, which instituted the Arkansas Highway Use Equilization Tax (HUE Tax), as a violation of the Commerce Clause. The Pulaski County Chancery Court upheld the tax, and we affirmed. *American Trucking Associations, Inc. v. Gray*, 288 Ark. 488, 707 S.W.2d 759 (1986). While the case was on certiorari, the Supreme Court decided *American Trucking Associations, Inc. v. Scheiner*, —— U.S. ——, 107 S.Ct. 2829 (1987), invalidating a similar Pennsylvania tax. The Supreme Court

vacated our judgment in the *Gray* case and remanded it to us for reconsideration in light of its decision in the *Scheiner* case. On August 14, 1987, the appellees, Henry C. Gray, Director of the Arkansas Highway and Transportation Department, et al., were ordered by Mr. Justice Blackmun, in his capacity as Circuit Justice, to place HUE tax receipts in an interest-bearing escrow. As directed, we now reconsider our prior decision of the case. In addition to the basic question of the constitutionality of the act, we have been asked by the appellant class represented by ATA to decide whether and to what extent taxes collected pursuant to the act are to be refunded if the act is invalidated. We are also asked to determine whether counsel for ATA are entitled to court ordered attorney fees. We hold that the act is unconstitutional, the taxpayers represented by ATA are entitled to have refunded the taxes they have paid into the escrow fund, and the case is to be remanded to the chancery court to determine the manner of refund distribution and payment of attorney fees.

1. *Unconstitutionality*

We need not set out the details of the HUE tax, as that was done in our earlier opinion in this case. Nor do we need to detail the Pennsylvania tax, which was held invalid in the *Scheiner* case, and the somewhat persuasive arguments about how the HUE tax differs significantly from the Pennsylvania tax. The important point to recognize is that, in the *Scheiner* case, the Supreme Court applied its "internal consistency" test and said, in effect, that if a state's tax treats truckers whose bases of operations are outside the state differently from those based in the taxing state, it violates the Commerce Clause. It is conceded that the HUE tax effectively costs other truckers more per mile than it costs those based in Arkansas, despite the option, which is available to all, to pay a flat rate or a per-mile rate or a trip rate. Therefore, we

have little doubt that the Supreme Court would hold that the HUE tax is unconstitutional, and that is our holding.

2. *Refunds*

The HUE tax promulgated by Act 685 of 1983 was repealed by Act 3 of 1987 (2nd Ex. Sess.). Thus, our decision that the tax was unconstitutional is unimportant except to the extent it may call for refunds. From the time the tax was enacted until Mr. Justice Blackmun's order of August 14, 1987, some $159 million was collected and funneled to the state treasury. After the escrow account was created, some $4.9 million was collected and placed in the account. As the HUE tax was paid by all truckers, it is obvious that some of it was paid by those based in Arkansas. Some Arkansas HUE taxpayers have intervened on behalf of all such taxpayers contending, along with the appellees, that the non-Arkansas based truckers are not entitled to a refund. The Arkansas HUE taxpayers have also made it clear that they seek no refund.

To hold the interstate truckers were entitled to all of their HUE tax payments, we would have to apply to *Scheiner* decision retroactively. It should only be applied prospectively. The Supreme Court, in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), stated three factors to be considered in deciding to apply a judgment prospectively: (1) The judgment establishes a new rule of law overruling cases or arises from a case of first impression. (2) The purpose of the law will not be thwarted by prospective application. (3) A general balancing of the equities favors prospective application.

The first factor is aimed at whether it was reasonable for the state to have conducted itself as it did, given prior Supreme Court interpretations of the Commerce Clause. The *Scheiner* decision notes that several other states besides Arkansas and Pennsylvania had enacted

so-called "flat" highway taxes. Justice O'Connor, in her dissenting opinion, noted that these taxes would probably be found violative of the Commerce Clause pursuant to the *Scheiner* holding. The *Scheiner* case was decided five justices to four with strong dissenting opinions. It declared invalid a tax which a reasonable person could easily have found to pass Commerce Clause muster upon examination of *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs of Montana*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935) in which "flat" highway taxes were held not violative of the Commerce Clause. We relied on those cases, among others, in our original opinion in this case.

Second, the purpose of the law espoused in the *Scheiner* decision is to secure equal treatment for inter- and intrastate commerce and thus create an area of free trade among the states. No doubt prospective application will help achieve that goal. We agree with the Washington Supreme Court which recently found itself having to decide whether a Supreme Court decision would operate only prospectively with respect to invalidation of the Washington business and occupation tax. "It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate trade is in the past and the Legislature has enacted law to attempt to comport with the new commerce clause taxation laws announced in *Tyler* [*Tyler Pipe Indus., Inc. v. Department of Rev.*, —— U.S. ——, 107 S.Ct. 2810 (1987)]." *National Can Corp. v. Department of Revenue*, 109 Wash. 2d 878, —— P.2d —— (1988).

The equities favor disallowing refund of the tax money already paid into the state treasury. The interstate, non-Arkansas based truckers have used Arkansas highways with their heavy trucks to which the HUE tax applied since 1983. To refund everything paid by them since

that date would allow them an unconscionable windfall far in excess of a fair recovery for the discrimination they may have suffered due to the tax. It would constitute unfair treatment of the Arkansas-based truckers who have paid the tax and seek no refund. It is fair, however, to allow to the ATA class a refund of the HUE tax money paid into escrow since August 14, 1987, when the appellees were put on notice that the ATA's claims were ones which were likely to succeed on their merits. The escrowed funds have not been placed in the state treasury and spent or, presumably, counted on for the future.

3. Attorney fees

We have consistently recognized that when a class action results in the recovery of a "common fund" it is proper to allow attorney fees to be paid from the fund. *Powell v. Henry*, 267 Ark. 484, 592 S.W.2d 107 (1980); *Marlin v. Marsh*, 189 Ark. 1157, 76 S.W.2d 965 (1934).

Conclusion

The case is remanded to the chancellor to determine the means by which the payments made by non-Arkansas based truckers into the HUE tax escrow fund may be refunded pro rata after deduction of attorney fees to be determined by the chancellor.

Reversed and remanded.

Hickman, J., dissents in part.

SUPREME COURT OF ARKANSAS

No. 85-101

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,

v.

HENRY C. GRAY, DIRECTOR,
ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT,
Appellees.

Opinion Delivered March 14, 1988

DARRELL HICKMAN, *Associate Justice*

I agree with the court's decision except regarding the refund. If the United States Supreme Court's decision in *American Trucking Associations, Inc. v. Schiener*, —— U.S. ——, 107 S.Ct. 2829 (1987), is to be applied prospectively, then the refund should be made from the date of that decision, or certainly no later than when we were asked, in July 1987, to place the funds in escrow. Our decision denying that request should have reflected that I did not participate.

DISSENT IN PART.

APPENDIX B

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
Justice Building
Little Rock, AR 72201

April 25, 1988

Peter G. Kumpe
Gregory T. Jones
Attorneys at Law
2200 Worthen Bank Building
Little Rock, AR 72201

Re: 85-101, American Trucking Associations, Inc. et al v. Henry C. Gray, Director, Arkansas Highway and Transportation Department et al

Gentlemen:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied.
Hickman, J., would grant."

Sincerely yours,

/s/ Leslie W. Steen
LESLIE W. STEEN
Clerk

LWS/rh

cc: Eugene G. Sayre
Pat Moran
Daniel R. Barney
Andrew L. Frey
Joe Morphew
Steve Clark
Ted Goodloe
B. Michael Bennett
Edward L. "Skip" Cullum
(#83-2360)

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-100

AMERICAN TRUCKING ASSOCIATION, INC., *et al.*

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*

ON APPLICATION FOR WRIT OF INJUNCTION

[August 14, 1987]

JUSTICE BLACKMUN, Circuit Justice.

This is an application for an injunction that would require Arkansas state officials to establish an escrow fund in which payments of the Arkansas Highway Use Equalization (HUE) tax, see Ark. Stat. Ann. §§ 75-817.2 and .3 (Supp. 1985), shall be placed, pending further proceedings challenging the constitutionality of that tax in Arkansas courts. The applicants, American Trucking Associations, Inc., et al. (ATA), brought suit in 1983 to challenge the HUE tax under the Commerce Clause, Art. I, § 8, cl. 3, of the Federal Constitution. The Chancery Court of Pulaski County sustained the constitutionality

of the tax, and a divided Arkansas Supreme Court affirmed. *American Trucking Assn., Inc.* v. *Gray*, 288 Ark. 488, 707 S. W. 2d 759 (1986). ATA appealed to this Court under 28 U. S. C. § 1257(2). We held the case pending our decision in No. 86-357, *American Trucking Assns., Inc.* v. *Scheiner*, which involved a similar constitutional challenge to two flat highway use taxes enacted by the Commonwealth of Pennsylvania. On June 23, 1987, this Court ruled in the Pennsylvania case that the Commonwealth's highway taxes violated the Commerce Clause because "the taxes are plainly discriminatory" in that they impose a heavier burden on out-of-state businesses that compete in an interstate market than they impose on local businessses that engage in similar commerce. 483 U. S. ——, —— (slip op. 18). The Court explained further that the Pennsylvania taxes failed the "internal consistency" test because "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." *Id.*, at —— (slip op. 17). We then vacated the judgment of the Arkansas Supreme Court and remanded the present case for further consideration in light of *Scheiner*. —— U. S. —— (1987). On July 16, 1987, pursuant to this Court's Rule 52.2, I granted ATA's motion for immediate issuance of the mandate.

Upon remand, ATA moved for further remand to the Chancery Court so that it could petition for a preliminary injunction either to enjoin enforcement of the HUE tax or to order an escrow of the funds collected. The Arkansas Supreme Court denied the motion. It also denied ATA's application for temporary relief, in the form of an escrow, pending decision in this case. That court is now in summer recess and consequently will not consider the merits of ATA's challenge until this fall, at the earliest. Applicants have requested that I order an escrow of the tax revenues pending final disposition of the case on the merits.

Several factors control a single Justice's consideration of an application for writ of injunction pursuant to this Court's Rule 44. If there is a "significant possibility" that the Court would note probable jurisdiction of an appeal of the underlying suit and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted, the Justice may issue an injunction. See *Nebraska Press Assn.* v. *Stuart*, 423 U.S. 1327, 1330 (1975) (BLACKMUN, J., in chambers). See also, *e. g.*, *Ledbetter* v. *Baldwin*, 479 U.S. ——, —— (1986) (Powell, J., in chambers); *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers). Applying these principles to the facts before me, I grant the application.

After considering the submissions of applicants and respondents, I have concluded that ATA is likely to succeed on the merits of its challenge to the Arkansas HUE tax. The effect of the HUE tax is substantially similar to that of the Pennsylvania unapportioned flat taxes invalidated in *Scheiner*. For most motor carriers, the HUE tax is a flat amount that is not assessed in proportion to the taxpayer's presence in the State. According to the statistics presented to the Arkansas courts, in its practical operation the tax discriminates against interstate motor carriers whose trucks are registered outside Arkansas. On average, trucks registered outside Arkansas pay a per-mile HUE tax that is more than three times greater than the per-mile tax paid by trucks registered in Arkansas. Respondents argue that the validity of this statistical evidence has not been established. But given the structure of the tax, which benefits trucks that travel extensively within the State, it appears probable that any further analysis would confirm the discriminatory impact. Moreover, the tax exposes trucks that engage in extensive interstate operations to a cumulative tax burden that is not shared by trucks that operate in only one or a few States. The tax thus works to deter interstate commerce. I therefore find that there

is a significant possibility that the Arkansas courts will declare the HUE tax unconstitutional under the "internal consistency" test pronounced by this Court in *Scheiner*. If they fail to do so, I believe that there is a significant possibility that four Justices will consider the issue sufficiently meritorious to note probable jurisdiction and that this Court will reverse the decision.

I have also concluded that the applicants risk irreparable injury absent injunctive relief. Arkansas officials have expressed their intention to continue collecting the HUE taxes during the pendency of the case and have refused to accept payment of the taxes "under protest." Motor carriers operating interstate must pay the annual HUE tax by August 31. If motor carriers refuse to pay the tax pending a determination of its constitutionality, they will be barred from the State's highways and will suffer substantial economic losses. On the other hand, if motor carriers pay the tax, there is a substantial risk that they will not be able to obtain a refund if the tax ultimately is declared unconstitutional. Applicants assert, by way of affidavit, that the Arkansas Highway Department has informed them that, should the tax be invalidated, the State will assert immunity from any subsequent refund order. Respondents have not denied that they will adopt this stance. There is a risk that, like other state courts, the Akansas courts would deny restitution of taxes found to have been unconstitutionally collected. See, *e. g.*, *Private Truck Council of America, Inc.* v. *New Hampshire*, 128 N. H. 466, 517 A. 2d 1150, 1155-1157 (1986); *American Trucking Assns., Inc.* v. *Conway*, 146 Vt. 579, 508 A. 2d 408, 413-414 (1986), cert. denied, 483 U. S. —— (1987). Such a denial would constitute irreparable injury.

For their part, respondents will not be irreparably injured by the issuance of the injunction. Respondents have not argued that the temporary loss of revenues, while the funds are held in escrow, will adversely affect

the State's operations. Rather, they contend that the State will be harmed if the funds are returned to the motor carriers, because the HUE tax is intended to defray the cost of wear on Arkansas' highways attributable to the heavy trucks subject to the tax. But the requested injunction would not direct a refund. If the funds are escrowed and the HUE tax is invalidated, the issue of the appropriate remedy will be a separate matter for the Arkansas courts to determine. On balance, therefore, I conclude that the equities favor issuance of the injunction. Accordingly, I have today entered an order enjoining respondents to escrow the HUE taxes to be collected, until a final decision on the merits in this case is reached.

APPENDIX D

STATE OF ARKANSAS
IN THE SUPREME COURT

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 6th day, being the first Monday of October, A. D. 1986, amongst others were the following proceedings, to-wit:

On the 30th day of July, A. D. 1987, a day of said term—

No. 85-101

AMERICAN TRUCKING ASSOCIATION, INC. *et al*
Appellants

vs.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT, *et al*
Appellees

Appeal from Pulaski Chancery Court,
Fourth Div. District

LAW OR CHANCERY MANDATE

Appellants' application for temporary relief is denied. Glaze, J., not participating.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 30th day of July, A.D. 1987.

/s/ Dona L. Williams
Clerk

APPENDIX E

STATE OF ARKANSAS
IN THE SUPREME COURT

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 6th day, being the first Monday of October, A. D. 1986, amongst others were the following proceedings to to-wit:

On the 20th day of July, A. D. 1987, a day of the said term—

No. 85-101

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al*
Appellants

vs.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT, *et al*
Appellees

Appeal from Pulaski Chancery Court
Fourth Div. District

(Chancery Court Case No. 83-2360 & 84-374)

LAW OR CHANCERY MANDATE

Appellants' motion to remand to chancery court upon receipt of mandate is denied. To be briefed under Rule 16. Hickman and Glaze, JJ., not participating.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 20th day of July, A. D. 1987.

/s/ Dona L. Williams
Clerk

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. 86-358

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*

Appeal from the Supreme Court of Arkansas

THIS CAUSE having been submitted on the statement of jurisdiction and motion to dismiss,

ON CONSIDERATION WHEREOF, it is ordered by this Court that the appeal herein be, and it is hereby, vacated with costs, and that this cause is remanded to the Supreme Court of Arkansas for further consideration in light of *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. —— (1987).

IT IS FURTHER ORDERED that the appellants, American Trucking Associations, Inc., et al., recover from Henry C. Gray, Director, Arkansas Highway and Transportation Department, et al. Two Hundred Dollars ($200.00) for their costs herein expended.

June 26, 1987

Clerk's costs: $200.000

APPENDIX G

SUPREME COURT OF ARKANSAS

No. 85-101
85-112

AMERICAN TRUCKING ASS'N., INC., *et al.*,
Appellants,

VS.

HENRY C. GRAY, DIR., ARK. HIGHWAY & TRANS. DEP'T, *et al.*,
Appellees,

and

AMERICAN TRUCKING ASS'N., INC., *et al.*,
Appellants,

VS.

CHARLES D. RAGLAND, COMM'R OF REVENUES, REVENUE DIV., *et al.*,
Appellees.

Appeal from Pulaski Chancery Court,
4th Div., Bruce T. Bullion,
Chancellor, #83-2360

Appeal from Pulaski Chancery Court,
2nd Div., John Earl, Chancellor,
#84-374

Opinion Delivered Apr. 14, 1986

JACK HOLT, JR., *Chief Justice*

In this consolidated appeal, the constitutionality of Act 685 of 1983, Ark. Stat. Ann. §§ 75-817.2, 75-817.3 and 75-819(b) (Supp. 1985), is challenged. The Act imposed a Highway Use Equalization (HUE) tax on all trucks that operate on Arkansas highways at maximum weights between 73,281 and 80,000 pounds. The appellants, American Trucking Association[s], Inc., (ATA), filed a complaint in Pulaski Chancery Court, fourth division, against appellees, Arkansas Highway and Transportation Department, alleging that the HUE tax would be an "illegal exaction." Appellants requested a temporary restraining order preventing the money collected under Act 685 from being deposited into the state treasury. Chancellor Bruce Bullion dissolved the temporary restraining order and denied appellants' requested preliminary injunction. That decision was appealed to this court. We affirmed Chancellor Bullion's decision and reserved any further consideration until after a trial on the merits. *American Trucking Ass'n, Inc., et al v. Gray, Director*, 280 Ark. 258, 657 S.W.2d 207 (1983).

The case was remanded, certified as a class action, and the trial on the merits was held. Appellants attempted to prove that the HUE tax as written and administered was violative of the commerce clause, the privileges and immunities clause, and the equal protection clause of the fourteenth amendment to the United States Constitution. Chancellor Bullion ruled on October 11, 1984, that the tax was constitutional and that appellants' counsel were not entitled to attorneys' fees.

On January 25, 1984, the companion case of *ATA, Inc., et al v. Charles D. Ragland, et al*, was filed in the second division of Pulaski Chancery Court. That complain also challenged the tax as an illegal exaction and alleged that Act 685, which was approved by a mere majority vote of the General Assembly, was subject to the three-fourths voting majority required by amedment

19 § 2 of the Arkansas Constitution. Chancellor John Earl granted appellees' motion for summary judgment on this issue. Since the facts and issues in the two appeals are similar, they were consolidated in this court. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(a), (c), and (j). We uphold the constitutionality of Act 685.

Act 685 provides that the HUE tax is to be administered for all Arkansas base-registered trucks by the Commissioner of Revenues of the Revenue Division of the Department of Finance and Administration, while the Director of the Arkansas State Highway and Transportation Department administers the tax for all non-Arkansas base-registered trucks. The Act provides that the HUE tax for all vehicles can be satisfied through the election to pay:

1) an annual flat fee of $175;

2) a fee equal to 5¢ per mile for every mile the truck travelled in Arkansas during the previous registration year; or

3) for the purchase of a trip permit at the rate of $8.00 per hundred miles driven.

The appellants primarily rest their arguments on the results of a survey conducted by ATA regarding Arkansas and non-Arkansas base-registered trucks upon which the HUE tax is imposed. The survey results, according to appellants, established that the average cost of complying with the HUE tax, on a per mile of operation basis, affects non-Arkansas base-registered trucks at a rate 370% higher than it impacts Arkansas base-registered trucks. Under these circumstances, appellants maintain the practical effect of the HUE tax is to unconstitutionally discriminate against the non-Arkansas based vehicles' use of the highways. The appellants urge seven points for reversal, which will be discussed individually.

I.

THE HUE TAX VIOLATES THE COMMERCE CLAUSE

States are not permitted to tax interstate commerce in a manner that discriminates in favor of local interests. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

The appellants pursue two theories in their commerce clause argument. First, they state the HUE tax, although facially neutral, imposes a far higher effective tax rate on out-of-state trucks than on in-state trucks for the same use of the highways. Their second argument is that as a flat, nonproportional tax, it is not fairly related to the level of highway services provided by the state to each HUE taxpayer.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court considered the validity of a state sales tax under the commerce clause. The Court noted that under its prior decision in *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), a state tax on the "privilege of doing business" was *per se* unconstitutional when it is applied to interstate commerce. In *Brady*, the Supreme Court overruled *Spector*, and instead, applied a four-part test to determine constitutionality under the commerce clause. Under that test a tax is valid when the tax (1) "is applied to an activity with a substantial nexus with the taxing State", (2) "is fairly apportioned", (3) "does not discriminate against interstate commerce", and (4) "is fairly related to the services provided by the State." In *Burlington N.R.R. Co. v. Ragland, Comm'r*, 280 Ark. 182, 655 S.W. 2d 437 (1983), we acknowledged that "whenever there is a challenge to any state tax on interstate commerce, the tax will be subjected to the *Brady* test."

The appellants maintain that the HUE tax fails to meet the third and fourth prongs of the *Brady* test. Since they admit that the tax is facially neutral, the appellants are claiming in their discussion of the third prong, that its practical effect is to discriminate against interstate commerce. This argument is based on the results of the ATA survey discussed previously. Although several arguments, pro and con, are made about the veracity of the ATA survey, we find no evidence that the HUE tax discriminates against interstate commerce. The tax is structured to offer three options for compliance. A truck that meets the criteria of the tax may pay an annual flat fee, a fee based on mileage, or buy a trip permit. These options are available to intrastate and interstate carriers alike. The money collected is used to offset highway repairs and costs and thus the HUE tax is in the nature of a user fee or tax.

In *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n, et al*, 295 U.S. 285 (1935), the U.S. Supreme Court discussed a Georgia statute imposing an annual license fee for the maintenance of the highways. The Court found the statute did not lay an unlawful burden on interstate commerce. In so holding, the Court noted that the fee is a moderate amount, it is used for the upkeep of highways, and "it is exacted without hostility to foreign or interstate transactions, being imposed also upon domestic vehicles operated in like conditions." There, too, the Court was confronted with the argument that the out-of-state carrier uses the roads of Georgia less than the local carriers, yet they pay the same amount. The Court held, "[t]he fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may" (citation omitted).

Here, the amount of the fee is not being challenged as unreasonable *per se*, the money is used for the upkeep of

the highways traveled by the carriers being taxed, and the tax applies to foreign and domestic carriers alike. The interstate carriers can opt to pay the flat fee. The fact that they do not make extensive use of the state's highways does not make the tax levied discriminatory.

Again, in *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs of Montana, et al*, 332 U.S. 495 (1947), the Supreme Court discussed two flat highway taxes imposed "in consideration of the use of the highways of this state." The Court found neither exaction discriminated against interstate commerce since each applies alike to local and interstate operations and neither taxes traffic or movements taking place outside Montana. The Court stated:

> Motor carriers for hire, and particularly truckers of heavy goods, like appellant, make especially arduous use of roadways entailing wear and tear much beyond that resulting from general indiscriminate public use. . . . Although the state may not discriminate against or exclude such interstate traffic generally in the use of its highways, this does not mean that the state is required to furnish those facilities to it free of charge or indeed on equal terms with other traffic not inflicting similar destructive effects. . . . Interstate traffic equally with intrastate may be required to pay a fair share of the cost and maintenance reasonably related to the use made of the highways. (citations omitted).

The appellants maintain that the *Brady* decision overruled the Court's early decisions in the two *Aero Mayflower* cases. We disagree. The Court expressly overruled only *Spector*. It did not so treat these cases. Furthermore, in *Massachusetts v. United States*, 435 U.S. 444 (1978), decided one year after *Brady*, the Supreme Court analogized the problem of a flat fee registration tax on all civil aircraft, to their previous motor vehicle tax cases, citing the Montana *Aero Mayflower* decision.

The Maryland Court of Appeals reached a similar conclusion in *American Trucking Ass'ns, Inc., et al v. Goldstein, et al*, 483 A.2d 47 (Md. 1984), using reasoning we now adopt. That court discussed an annual registration fee imposed on all motor carriers operated in Maryland. The Maryland court specifically found that *Brady* "did not undercut the previously discussed flat highway user tax cases", which included both *Aero Mayflower* decisions.

In finding that the registration fee did not discriminate against interstate commerce under *Brady*, the Maryland court noted that "[i]t is not aimed at placing interstate business at a competitive disadvantage with local businesses", it "applies equally" to in-state and out-of-state registered motor carriers, and its purpose "is not to protect local carriers against foreign competition." Rather, the court noted its purpose "is to spread evenly among all commercial users the tax burden of supporting Maryland's highway system." The HUE tax meets the same criteria and accomplishes the same purposes.

The appellants claim their statistics show that the HUE tax is discriminatory because, on a cost per mile basis, out of state truckers are charged more. Assuming their statistics are valid, the flat tax portion of our law must, logically, be the most onerous provision. The per mile or per trip alternatives benefit the out of state truckers by permitting them to pay less than the flat tax. We need go no further than to cite the cases holding that a flat tax is not discriminatory. The alternatives offered by our law, which in fact could benefit the out of state truckers, do not make this case distinguishable from the ones approving the flat rate as being a proper tax method in the context of a commerce clause challenge.

As to the argument under the fourth prong of *Brady*, that as a flat tax, it is not fairly related to the level of highway services provided by the state to each HUE

taxpayer, it can be answered under the same authority as the previous argument.

The first "flat fee" case dealt with by the U.S. Supreme Court was the Georgia *Aero Mayflower* case, supra. The Court upheld the flat tax then, and in subsequent flat fee cases, holding that a state may impose a flat fee for the privilege of using its roads. In *Capitol Greyhound Lines, et al v. Bruce, Comm'r*, 339 U.S. 542 (1950), the Court held that the formula used in calulating the flat tax was not crucial, rather the relevant inquiry was whether the amount of the tax was excessive. We agree. Acts of the Legislature are presumed to be constitutional and will not be held by the courts to be unconstitutional unless there is a clear incompatibility between the act and the constitution, with all doubts resolved in favor of the act. *Pulaski County Municipal Court v. Scott*, 272 Ark. 115, 612 S.W.2d 297 (1981). Here, the flat tax rate of $175 was not shown to be excessive or unreasonable.

II.

THE HUE TAX VIOLATES THE EQUAL PROTECTION CLAUSE

The fourteenth amendment to the U.S. Constitution provides that no person shall be denied equal protection of the law by any state. Before a statute can be reviewed under the equal protection guarantee, a party must demonstrate that the law classifies persons in some manner. Nowak, Rotunda, & Young, *Constitutional Law*, p. 600 (2d ed. 1983). There are three ways to establish a classification: the statute may do so on its face; a facially neutral statute may be applied unevenly to different groups by those administering it; or a facially neutral law, applied evenhandedly, in reality may constitute a device designed to impose different burdens on different classes of persons. *Id.* The appellants argue

that the tax classifies carriers based on interstate versus intrastate commerce.

Once a classification is found to exist, the equal protection analysis turns on whether the classification bears a rational relationship to a legitimate state interest.

We need not reach the rational relationship test, however, because no classification exists. The appellants acknowledge that the statute is facially neutral, so the first method of classifying its not established. The other two methods concern the uneven application and the burdensome effect of a neutral statute. We have already indicated in our discussion of the commerce clause that the statute is applied to interstate and intrastate carriers alike and does not have a discriminatory effect on interstate commerce. Since interstate commerce is not singled out for disparate treatment, no classification on that basis is made, and no equal protection problem arises.

III.

THE HUE TAX VIOLATES THE PRIVILEGES & IMMUNITIES CLAUSE

The privileges and immunities clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States." United States Constitution, Art. IV, § 2. It is well established that the privileges and immunities clause is inapplicable to corporations. *Hemphill v. Orloff*, 277 U.S. 537 (1928); *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Calif.*, 451 U.S. 648 (1981). The named appellants, ATA, et al, are all corporations. Nevertheless, they argue that since their complaint was certified as a class action, there are non-corporate individuals within the class which permits them to raise a privileges and immunities challenge, citing *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982), *rehearing denied. Cash* does not stand for that proposi-

tion. The lawsuit in that case was filed by six residents of the city of Little Rock who were water users. The case was certified as a class action. There is no discussion about corporate and noncorporate parties. Nor did our research indicate that there is any case law stating that it will be assumed that noncorporate individuals are included in a class action in a case such as this. In fact in *ATA, et al v. Goldstein, et al, supra*, the same appellants attempted to raise a privileges and immunities argument. The Maryland court noted that the clause was inapplicable to corporations and stated: "[a]ll of the named plaintiffs are corporations. As such, they have no standing to challenge § 423(a) under the Privileges and Immunities Clause of Art. IV." Here, as in that case, all the named plaintiffs are corporations. Therefore, they have no standing to make this argument.

IV.

THE ARBITRARY & DISCRIMINATORY REGULATIONS & ADMINISTRATION OF THE HUE TAX ARE UNCONSTITUTIONAL

Act 685 divides authority for the administration of the HUE tax between the Commissioner of Revenue of the Department of Finance & Administration (DF&A), for Arkansas base-registered vehicles; and the Director of the Arkansas State Highway & Transportation Department (ASH&TD), for non-Arkansas base-registered vehicles. Appellants do not object to the regulations or administration by the DF&A. Their argument under this point instead is directed toward the ASH&TD, whose regulations and policies, they maintain, violate the commerce clause, the privileges and immunities clause, and the equal protection clause of the Constitution.

We can immediately dispense with the privileges and immunities argument since the named appellants are

corporations. As to the commerce clause and equal protection allegations, the appellants maintain that the regulations and policies of the ASH&TD violate the first and third prongs of the *Brady* test, *supra*. The appellants specifically object to (a) the ASH&TD's general approach, (b) the specialty carrier status, and (c) fleet registration.

(a) The general policies named by appellants are that the ASH&TD, unlike the DF&A, does not allow the owner/operator of non-Arkansas base-registered trucks the option of choosing whether to qualify their trucks by weight for the use of the highways afforded by payment of the HUE tax. The policy appellants are challenging requires non-Arkansas base-registered trucks to either declare that they are carrying 73,281 pounds in Arkansas and pay the HUE tax, or else take some affirmative action to elect not to carry that weight. A non-Arkansas base-registered truck who has not taken either of these actions is not allowed to enter the state. This affirmative action is burdensome on interstate commerce according to the appellants.

The appellants' argument is without merit. All trucks must decree their gros weight for travel in Arkansas. Arkansas base-registered vehicles do so when they register in this state. Those Arkansas vehicles who participate in the International Registration Plan (IRP) declare their weight by a sworn statement on the IRP application. Obviously, a comparable opportunity was needed for non-Arkansas base-registered carriers to declare their gross weight. The Highway Department established a mechanism where a carrier could either qualify and pay the HUE tax or formally declare a gross weight below 73,281 pounds and obtain a free specialty carrier decal. The state's interest in a weight declaration from all trucks travelling on state highways is apparent, satisfying the first prong of *Brady*.

As to the discrimination issue raised under the third prong, all carriers have to take some affirmative action to declare the weight of their vehicles. Here, ASH&TD had the authority to promulgate its regulation and it is reasonable. As a practical matter the mechanism for registration differed for interstate vehicles, yet the result was the same, without undue burden to interstate commerce. During oral arguments, appellee's counsel explained that to implement registration procedures, it was necessary to utilize a certain policy during the first two years of registration after the act became effective, however, that now there is no difference in registration for those carriers who are members of IRP. They are presently allowed to declare the gross weight of their vehicles when they register in other states. Likewise, non-Arkansas base-registered carriers, who are not members of IRP, still submit an affidavit as to weight and receive a special carrier decal upon entry into Arkansas. These simple methods for carriers to declare gross weight of vehicles for travel in Arkansas are non-discriminatory.

(b) The specialty carrier status was created by regulation and is awarded to carriers entering the state who are carrying below 73,281 pounds or fall within a statutory exemption and are thus not subject to the HUE tax. The specialty carrier decal is given free to those carriers and allows them entry into the state. Appellants contend the status was created by regulation even though the language of Act 685 does not provide a rational basis for the creation of such a classification. This action, they claim, violates the agency's legislative grant of rule-making authority, citing *State, ex rel Attorney General v. Burnett*, 200 Ark. 655, 140 S.W.2d 673 (1940). *Burnett* held that a regulation promulgated by the commissioner of revenues was contrary to the applicable statute and therefore void. The specialty carrier status is not contrary to Act 685. It identifies exemptions to the HUE tax, including trucks carrying less than 73,281

pounds. Since the ASH&TD is required to administer the HUE tax and to do so requires a determination of the gross weight of vehicles using the state's highways, the designation of the speciality carrier status is a way to facilitate collection of that tax and is within the agency's power to promulgate.

(c) Appellants also complain that non-Arkansas base-registered carriers must qualify their trucks by an "integral fleets" classification, under only one payment option. Arkansas-based owner/operators are allowed by DF&A to pick their payment option and apply it to their individual trucks, according to appellants.

The appellants misinterpret the pertinent policies. The actual practices of the ASH&TD and DF&A are the same: they allow one payment option per fleet. Arkansas base-registered vehicles that are registered under the IRP have their mileage reported by the IRP on a fleet basis. That IRP mileage documentation is then used by the DF&A to allow the carrier to select an option for each fleet. Similarly, the ASH&TD allows mileage documentation to be computed on a fleet basis using either IRP records or other records submitted to a governmental entity for some official purpose. Once the fleet is set, in either case, only one option of HUE payment is allowed.

The ASH&TD allows non-Arkansas based carriers, where separate integral fleets exist under one ownership and separate record and reporting systems are maintained for each integral fleet, to select separate options. Highway Department Regulation V(B). The DF&A also has a regulation stating that IRP qualification shall be on a fleet basis and all affected vehicles will pay either of two relevant options. Highway Use Equalization Tax Regulations, paragraph (8). Mary Ellen Garke, head of the Revenue IRP Unit, testified that a single IRP fleet can select an option but the owner has to then exercise the same option with all the trucks in that account or fleet. Since there is no disparate treatment there is no basis for a claim of discrimination.

V.

ACT 685 OF 1983 WAS NOT ADOPTED IN ACCORDANCE WITH THE REQUIREMENTS OF THE ARKANSAS CONSTITUTION

Amendment 19 § 2 of the Arkansas Constitution provides that no rates for "property, excise, privilege or personal taxes now levied shall be increased by the General Assembly except . . . in case of an emergency, the votes of three-fourths of the members elected to each House of the General Assembly."

The appellants suggest that Act 685 is an increase in an existing "privilege tax" and is therefore subject to the three-fourths vote requirement. In support of their allegation that an existing privilege tax has been increased, appellants point to the registration fee charged under Ark. Stat. Ann. § 75-201 (Repl. 1979 and Supp. 1985), as the tax that Act 685 increased. Appellees maintain this is a new tax on the new privilege of carrying larger loads. We find that amendment 19 § 2 is inapplicable because Act 685 does not impose a privilege tax but rather exacts a user fee from motor vehicles carrying the prescribed weight. In *Evansville-Vanderburgh Airport Auth. Dist., et al v. Delta Airlines, Inc.* 405 U.S. 707 (1972), the U.S. Supreme Court explained:

> that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike . . .
>
> . . . .
>
> At least so long as the toll is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster . . .

Such charges for the use of public facilities, like highways, have been characterized as being in the "nature of rent charged by the State, based upon its proprietary interests in the public property, rather than of a tax." Hartman, *Federal Limitations on State and Local Taxation, Chapt.* 12 p. 665 (1981).

We find that this is a user fee, passed by the Legislature to compensate the state for the wear and tear on the highways caused by trucks carrying the higher weights. It is not a privilege tax in a technical sense. A privilege tax is "[a] tax on the privilege of carrying on a business or a occupation for which a license or franchise is required." Black's Law Dictionary (5th ed. 1979). Trucks not carrying the higher weight are not prohibited from travelling through the state, thus, the HUE tax is not a tax for the privilege of carrying on a business. It is instead a charge for the damage done by trucks carrying the higher weights and is exacted to make repairs. Since the approval of a user fee does not necessitate a three-fourths majority in the Legislature, appellants' argument is without merit.

VI

THE FINDINGS & CONCLUSIONS OF THE CHANCELLORS ARE INSUFFICIENT UNDER ARCP RULE 52(a)

Arkansas Rules of Civil Procedure Rule 52(a) provides that, in contested actions tried by a judge without a jury, if requested by a party, "the court shall find the facts specifically and state separately its conclusions of law thereon." Appellants here object to the findings of fact and conclusions of law promulgated by the chancellors, claiming they were very brief, general and conclusory in nature. Rule 52(a) does not address the specificity with which findings of fact and conclusions of law must be made. Furthermore, we review chancery

cases *de novo* and the chancellors' findings and conclusions are supported by the record in this case. Accordingly, this point is not well taken.

VII.

APPELLANTS SHOULD BE AWARDED ATTORNEYS' FEES WITH REGARD TO ANY REFUNDS RECEIVED BY MEMBERS OF APPELLANT CLASS

The appellants pursue two theories seeking attorneys' fees. Initially they state that if this court should find that the HUE tax is an illegal exaction and refund taxes collected to members of appellant class, that a portion should be awarded as attorneys' fees. Since we find that the tax is constitutional, this argument need not be addressed.

Appellants next contend that, notwithstanding the decision on the merits, Chancellor Bullion erred in denying them an award of $9,270.42 in attorneys' fees. The chancellor found that refunds were made to the class from taxes erroneously collected pursuant to emergency regulations, before the final regulations were enacted. The final regulations did not include this erroneously collected tax. The judge ruled, however, that there was no common fund from which the attorneys' fees could be paid, and denied the claim. We agree.

In *Powell, Mayor of N.L.R. v. Henry*, 267 Ark. 484, 592 S.W.2d 107 (1980), the appellants sought attorneys' fees from refunds that were made to electrical ratepayers. This court held that attorneys' fees were proper because the refund created a common fund, and stated:

> [T]he action was a class action, which resulted in the recovery of a substantial amount which constituted a common fund. The allowance of attorneys' fees from a common fund established or augmented

> through the efforts of the attorneys to whom the fee is allowed is a well recognized practice and is proper. (citations omitted).

Awards have been made by courts based on the common fund doctrine where the liitigation results in the creation of a common fund against which the fees may be awarded. Annotation, 89 A.L.R.3d 690, 701 (1979).

In finding that the common fund requirement was not met, Chancellor Bullion explained in a letter opinion that:

> Because the Court refused to enjoin the collection of this tax, and refused to require the tax monies to be deposited in an escrow account, all of the tax monies collected under Act 685 have been, and are now being deposited in the State Treasury. There is no impounded fund from which costs and fees that might be allowed for a successful taxpayers action to be drawn.
>
> Monies paid by truckers under the offensive emergency regulation long ago ceased to be paid, and those who paid under its mandates received full refunds long ago. It is probably true that other lawful Act 685 taxes are being received by the State on a daily basis, but this tax money is not related to the offensive emergency regulation, rather are being collected pursuant to the valid exercise of the State's power to tax. In this situation, it is beyond the power of this Court to order state government to pay counsel for the class a fees for services, no matter how deserving it may be.

We do not find the chancellor's finding of fact that no common fund was established to be clearly erroneous. Ark. R. Civ. 52(a). Accordingly we affirm his judgment.

Affirmed.

Purtle, J., not participating.

Hickman, J., dissents.

DARRELL HICKMAN, Associate Justice, dissenting.

This is a test of the Arkansas Highway Department's answer to the claim that our state's highways will be damaged because of the increase of the maximum weight limit on trucks to 90,000 pounds. The legislature's goal was to tax these heavy trucks to make them pay for their share of the damage to our highways. That worthy goal was partly forgotten by the legislators, resulting in a tax which decidedly favors Arkansas-based trucks. Those trucks may do all the damage they want for $175 per year.

The evidence reflected that interstate truckers invariably choose to pay five cents per mile or purchase a trip ticket, rather than pay the annual fee of $175 per truck. That is the only sensible choice for interstate truckers who will not use Arkansas Highways extensively. Arkansas-based truckers just as sensibly choose to pay the $175 per truck every year, because there is no mileage limit with that payment. They can drive thirty thousand miles for considerably less than five cents a mile.

Interstate truckers, not based in Arkansas, are paying 370% more than Arkansas-based truckers for the damage done. That is discrimination that violates the commerce clause of the United States Constitution. Discriminatory, parochial legislation such as this interferes with interstate commerce, an exclusive province of the federal government. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

Perhaps most important to us in Arkansas is the fact that the tax as delineated does not make those pay who may do the most damage; our own truckers.

The tax must be fairly related to the services provided, in this case decent highways. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). A mile-weight tax is probably the most fair and sensible answer to the problem: all truckers, Arkansas-based and interstate, pay equally for the damage to the highways. Not only is that sensible, it is unquestionably fair to the people of this state who have to bear any unpaid costs for damage.

I would find the tax violates the commerce clause of the United States Constitution.

APPENDIX H

SUPREME COURT OF ARKANSAS

No. 85-101
85-112

AMERICAN TRUCKING ASS'N, INC., *et al.*,
Appellants,

vs.

HENRY C. GRAY, DIR., ARK.
HIGHWAY & TRANSP. DEP'T, *et al.*,
Appellees,

and

AMERICAN TRUCKING ASS'N, INC., *et al.*,
Appellants,

vs.

CHARLES D. RAGLAND, COMM'R OF
REVENUE, REVENUE DIV., *et al.*,
Appellees.

Appeal from Pulaski Chancery Court,
4th Div., Bruce T. Bullion,
Chancellor, #83-2360

Appeal from Pulaski Chancery Court,
2nd Div., John Earl, Chancellor
#84-374

Supplemental Opinion on Denial of Rehearing
Opinion delivered May 27, 1986

JACK HOLT, JR., Chief Justice. The appellants filed a petition for rehearing contending in part that we erred by failing to address the question of whether the HUE tax violates the privileges and immunities clause of the United States Constitution.

In the opinion, we incorrectly found the appellants lacked standing to raise this argument since all of the named plaintiffs are corporations and the privileges and immunities clause is inapplicable to corporations.

Appellants maintain in their petition that the parties had stipulated that there were two individuals named in the complaint as representative appellants who were so named for the purpose of raising this issue. The respondent states that this is so. Accordingly, we admit error and address this question on its merits.

The privileges and immunities clause provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities in the Several States:

The United States Supreme Court has explained that "[t]he primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948); *see also Paul* v. *Virginia*, 8 Wall. 168 (1868); *Ward* v. *Maryland*, 12 Wall. 418 (1870). In *Ward* v. *Maryland*, the Supreme Court stated:

> Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the Clause plainly and unmistakably secures and protects the rights of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation . . . and to be exempt from any

higher taxes or excises than are imposed by the State upon its own citizens.

Ward, at p. 430.

The HUE tax does not violate the privileges and immunities clause. We have already held that the tax is facially neutral, applying equally to both Arkansas base-registered trucks as well as to non-Arkansas base-registered vehicles. Further, the Arkansas and non-Arkansas based trucks share the same opportunity of carrying the higher weights. Therefore, there is no classification made between citizens of one state as opposed to citizens of another state.

The second argument by petitioners is that the court was incorrect in finding that the tax did not discriminate against non-Arkansas based trucks. Petitioners cite two Vermont cases which have been decided since the arguments were presented in this appeal. We are obviously not bound by the decisions of a Vermont court. Furthermore, in those cases, the court found that the relevant statutes imposed different requirements on out-of-state operators. Here, the HUE tax applies equally to all operators and any disparity in amounts results from the number of miles traveled by their trucks. The rest of petitioners' argument on this issue and their final contention are essentially restatements of their original brief and thus not proper for rehearing. Sup. Ct. R. 20(g).

Rehearing denied.

PURTLE, J., not participating.

HICKMAN, J., would grant rehearing.

APPENDIX I

SUPREME COURT OF ARKANSAS

No. 83-209

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED TAXPAYERS; ARKANSAS BUS AND TRUCK ASSOCIATION INC., AND JONES TRUCK LINES, INC., ON BEHALF OF THEMSELVES & ALL OTHER SIMILARLY SITUATED TAXPAYERS,

Appellants

VS.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION,

Appellees

Sept. 19, 1983

PURTLE, Justice.

This appeal is from an interlocutory order denying an injunction to prevent monies being collected for the sale of motor fuels from being deposited into the state treasury and from being distributed to various state agencies, cities and towns. Appellants, filed a taxpayers' suit on May 27, 1983, attacking the constitutionality of Act 685 of 1983 claiming it to be an illegal exaction pursuant to Art. 16, sec. 13, of the Arkansas Constitution. The act levied a motor fuel tax upon certain fuels used by the trucking industry. A preliminary injunction was issued on the date suit was filed but was dissolved on July 29, 1983, after several days of testimony. Appellees presented evidence at the hearing on the temporary injunction that they would suffer damages up to $53,000,000 if the injunction were continued. The court set bond in the amount of $53,000,000 in order to stay the dissolution order. The notice of appeal and petition for certiorari was filed with this court on August 1, 1983. Subsequently, we granted appellants' motion to expedite the appeal. The decree of the chancellor is affirmed and the petition for certiorari is denied pending trial of the case on its merits.

At the hearing on the temporary injunction the chancellor found appellants' chances of prevailing on the merits of the case were not good. An order was issued dissolving the temporary injunction. The interlocutory order is an appealable order pursuant ot Arkansas Rules of Appellate Procedure, Rule 2(a)6.

Appellants claim that certain findings made by the chancellor were not valid in light of the evidence presented. Disputed findings by a chancellor are upheld on appeal, unless such findings are clearly erroneous. *Gray v. Ragland*, 277 Ark. 232, 640 S.W.2d 788 (1982). Many citations were presented to the chancellor and he was obviously persuaded that the highway use equalization tax imposed by Act 685 of 1983 would likely stand against

attack. In view of the presumption of validity of acts of the Arkansas General Assembly we cannot say the findings of the court below were clearly erroneous. *Arkansas Motor Vehicle Commission v. Cliff Peck Chevrolet, Inc.*, 277 Ark. 185, 640 S.W.2d 453 (1982).

The granting or denying of a temporary restraining order is a matter falling within the sound discretion of the trial court and its decision will not be reversed on appeal unless it is clearly erroneous. *Kreutzer v. Clark*, 271 Ark. 243, 607 S.W.2d 670 (1980).

Appellants correctly contend that irreparable harm must be shown before a restraining order or injunction will issue. The chancellor in this case did not find that irreparable harm would result to appellants. Therefore, an essential ingredient for continuing the temporary injunction is missing. ARCP, Rule 65. *Kreutzer v. Clark, supra.* We do not consider the merits of the case on this appeal. We are convinced that the record supports the chancellor's ruling. The case is scheduled to be heard on its merits before the end of the current month, and should a proper appeal be lodged after the final decision, we will at that time deal with the merits of the case as presented to us. On the present appeal, the decision of the chancellor is affirmed.

HAYS, J., not participating.

Supreme Court, U.S.
FILED
OCT 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-325

In the Supreme Court of the United States

OCTOBER TERM, 1988

American Trucking Associations, Inc., et al.,
Petitioners

v.

Maurice Smith, Director, Arkansas Highway and Transportation Department, et al.,
Respondents

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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No. 88-325

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OCTOBER TERM, 1988

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Petitioners

v.

Maurice Smith, Director, Arkansas Highway and Transportation Department, et al.,
Respondents

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

STATEMENT

There was a national debate and a very highly contested local debate concerning truck weights. Arkansas was one of the states with the lower truck weights of 73,280 pounds maximum gross loaded weight. Across the nation, Arkansas and states to the north formed a "barrier" for cross country trucking at 80,000 pounds.

For several state legislative sessions, the trucking interest attempted to raise truck weights to 80,000 pounds. Because of the necessary trade off between truck weights and increased taxes on trucks, the controversy never resolved. The conflict between increased damages caused by higher truck weights and increased revenues to pay for the repairs focused the dispute on the amount of damage caused by a truck weighing 80,000 pounds versus a truck weighing 73,280 pounds.

The Surface Transportation Act of 1982 [1] required all states to raise truck weights to 80,000 pounds. The Arkansas Legislature quickly raised the truck weights to 80,000 pounds [Ark. Code Ann. 27-35-203 (Repl. 1987) (App. A infra)] and later in the same session enacted a truck tax, Ark. Code Ann. 27-35-205 (Repl. 1987) (HUE Tax) (App. B infra). The Arkansas Legislature preferred a truck tax between the weight categories of 73,280 pounds to 80,000 pounds and preferred to not raise taxes on trucks with lower weights.

Because Arkansas taxed a new category of commercial use, it became extremely important to determine the effect of the heavy trucks in the weight categories of 73,280 pounds to 80,000 pounds. An American Trucking Association witness testifying at the trial in this case stated that the truckers would receive $115.8 million in additional monies because of the increased weights in Arkansas. This testimony was based on a 1982 report. The trial court found the damages caused by the increased truck weights would be $53 million dollars a year. The truck tax was estimated to produce approximately $22 million. The tax generated in 1983 approximately $23 million and by 1987 the tax had generated $31 million per year (App. C infra). The Arkansas Supreme Court's concern about the truckers receiving a windfall should refunds be retroactive is based on the clear testimony of profits earned and damages caused by the truckers [2].

1.
23 U.S.C. §127

2.
ATA v. Gray, 295 Ark. 43, 746 S.W.2d 377, 379 (1988).

REASONS FOR REFUSING THE PETITION

I. ARKANSAS AND PENNSYLVANIA HAD DIFFERENT TAXES

Although the Arkansas Truck Tax may look similar to the Pennsylvania Tax because the "flat" maximum for Arkansas is $175.00 as compared to the Pennsylvania Tax maximum of $180.00, the taxes are very different.

Over 50% of the revenues in 1986-87 were from truckers who paid the tax on a mileage rate rather than on a flat rate. (App. C infra). These truckers either paid 5 cents per mile for the past year's miles or 8 cents per mile for a trip permit. All taxes on trucks with 73,280 pounds total weight and below remained the same. They paid no additional taxes and did *not* have any decreases in taxes. The HUE tax is only on the category between 73,281 pounds and 80,000 pounds gross loaded weight.

Pennsylvania reduced its license fee by $180.00. Therefore, Pennsylvania domestic trucks paid no increase in taxes because the $180 axle tax would be offset by the decrease in the license fee. *ATA v. Scheiner*, 107 S.Ct. 2829, 2834 (1987).

Arkansas attempted to raise additional revenues for road construction to repair the damages from the heavy trucks. With its tax enjoined and Justice Blackmun's statement that in his opinion the tax was unconstitutional and he felt certain that four judges would note probable jurisdiction [3], Arkansas was forced to seek new legislation.

The Arkansas Legislature would not convene until January, 1989, therefore the Governor of Arkansas issued a call for a Special Legislative Session in October 1987, to remove the "flatness" of the Arkansas tax.

3.
ATA v. Gray, 108 S Ct. 2 (1987).

Justice Blackmun's opinion doomed the Arkansas HUE Tax. The only constitutional tax appeared to be a mileage tax with a clause "grandfathering in" those who had previously paid the tax rather than assessing them under a new tax. The new rate was set at 2.5 cents per mile without a maximum [4].

II. THE LOWER COURT DECISION

The Arkansas Supreme Court prospectively overruled the HUE tax in light of the *Scheiner* decision, *ATA v. Gray*, supra. However, the Arkansas Supreme Court went one step further and ordered partial refunds without permitting any Arkansas licensed truckers to receive the refunds. The decision additionally awards attorney fees.

The Arkansas Supreme Court, however, did not reach questions of state law inasmuch as it did not need to answer state law questions on tax refunds in its opinion. The state law issues not addressed are as follows: Sovereign Immunity, requirement of legislative appropriation of money from the Arkansas Treasury, and voluntary compliance with the tax [5]. In *Baccus Transports Ltd. v. Dias*, 468 U.S. 263 (1984), this court said:

> These refund issues . . . were not addressed by the state courts . . . . Also, resolution of those issues, if required at all may necessitate more of a record than so far has been made in this case. We are reluctant, therefore, to address them in the first instance . . . Ibid, 277.

4.
Ark. Code Ann. 27-35-205 (Repl. 1988) (App. D infra)

5.
The Arkansas Supreme Court in determining the date that taxes are paid involuntarily normally uses the date litigation begins. *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982), cert. denied 462 U.S. 1111 (1983). However, in this case the truckers could have easily hauled at 73,280 pounds. They "voluntarily" chose to incur the tax liability and also litigate.

III. PROSPECTIVE OVERRULING

The principle of "prospective" overruling occurred in *Chevron Oil Co., v. Huson*, 404 U.S. 97 (1971). The three prong test in *Chevron* may be stated as follows:

> 1. The new decision must set forth guidelines that clearly overrule past precedent. The litigants must have relied upon the past precedent and the new decision must not have been seen as forthcoming.

The American Trucking Associations challenged the Arkansas truck tax and the Pennsylvania truck tax. The states with taxes very similar but which were not in litigation in June 1987, were Kentucky and Indiana [6]. Therefore, four state legislatures previously adopted taxes directly affected by the *Scheiner* decision.

The dissents in *Tyler Pipe Indus. v. Washington*, 107 S.Ct. 2810 (1987) and *ATA v. Scheiner*, supra, state that the decisions constitute new precedent. This precedent could not have been seen as forthcoming because nine states had relied upon previous commerce law permitting a fixed or maximum tax. This new precedent may have originated in *Armco v. Hardesty*, 467 U.S. 638 (1984). However, states such as Washington did not foresee *Armco*, as having an effect on its laws. *National Can v. Dept. of Rev.*, 749 P.2d 1286 (Wash. 1988) appeal dism'd and cert. denied 108 S.Ct. 2030 (1988). The Washington Supreme Court believed the recent decision in *Tyler Pipe Indus.*, supra, qualified for prospective overruling under *Chevron v. Huson*, supra., because, among other reasons, new precedent occurred that could not have been foreseen. The State of Washington believed that its business and occupational tax was not similar to West Virginia's tax as determined in *Armco v. Hardesty* supra. See *National Can v. Dept. of Rev.*, supra at 1290. The *Armco* decision occurred in 1984, and Washington used its

6.
Other states with fuel marker fees similarly affected because the fees were in the nature of a flat tax were: Connecticut, Maine, Maryland, New Jersey, and Vermont. See footnotes 11 through 20.

Tyler Pipe Industries date, June 23, 1987, for prospective overruling. *National Can v. Dept. of Rev.*, at 1291.

> 2. The void ab initio aspect of unconstitutionality would not assist in the enforcement of the unconstitutional nature of the tax law.

The petitioners, ATA, made two arguments in relationship to this case about the second prong of *Chevron*. First, a state should not profit from its wrongs, and second, states are encouraged to enact unconstitutional legislation. These arguments do not appear responsive to the second prong of *Chevron*.

Flat taxes do not need retroactive application to encourage removal. Since June, 1987, there has been litigation in most of the states with flat taxes and high fuel marker fees. Arkansas called a Special Session of the Legislature solely for the purpose of removing the maximum rate of the tax because of Justice Blackmun's injunction. Declaring a tax unconstitutional does not require any enforcement. The taxpayers will enforce it and governments will change laws to prevent loss of tax revenues. ATA argues that Arkansas will profit from the tax. Arkansas increased truck weights and suffered additional damages from the heavier trucks. There is no profit in the HUE tax. Increased damages are much more than the total revenues from the HUE tax. If Arkansas is required to refund any money, new road construction will cease for a period of time. When Justice Blackmun impounded the HUE tax on August 14, 1987, the Department could not award any construction contracts for several months. Arkansas highway revenues are special revenues derived from taxes on vehicle license registrations and fuel taxes [7] These cash funds are distributed on the last business day of each month by the State Treasurer [8].

7.
Ark. Code Ann. 27-70-202 (App. E infra)

8.
Ark. Code Ann. 27-70-203 (App. F infra)

These special revenues are distributed monthly as follows: Three percent (3%) to the Constitutional and Fiscal Agencies and the remaining funds are divided 15% to the Counties, 15% to the Cities and 70% to the Highway Department. [9]

Arkansas does not accrue its highway construction funds. The funds are spent on a cash basis. Salaries, internal budgets and all construction funds are appropriated every two years by the Legislature *in advance* of collection. All excess or unspent funds may be used for construction. Therefore, monies are expended as they are received.

The petitioners, ATA, have had a long history of not wanting to pay their share of taxes. The road taxes (fuel and license taxes) are primarily paid by passenger cars. [10] The truckers have consistently opposed paying a fair share of maintenance costs and prefer to maintain the current rate of inequitable taxes. Any refund will only enrich companies who have previously charged the tax as a freight bill, cost of doing business or charged the independent owner-operator. Any inequity for Arkansas truckers has been removed by refunding the escrowed monies only to out of state truckers. *ATA v. Gray*, supra.

ATA's second argument is that if refunds are not retroactive, legislatures are encouraged to draft unconstitutional legislation. This statement insults the legislative process. The first impediment to legislation clearing a committee is a possibility of unconstitutionality. The legislative process is an extremely complicated democratic procedure with much "give and take." The

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9.
Ark. Code Ann. 27-70-206 (App. G infra)

10.
Truck license fees are apportioned so that one truck pays the average of one license fee, not several license fees, *ATA v. Scheiner*, supra, at 2834. Diesel fuel taxes are paid by all vehicles with diesel engines.

ATA's statement demonstrates contempt for the legislative branch of government indicating a preference for judicial action.

3. What results and inequities will be imposed by the retroactive application of this case as compared to prospective application.

The truckers on a nationwide basis received an increase of $115.8 million per year in a 1982 projection of profits from being able to haul goods across Arkansas in an 80,000 pound truck as compared to a 73,280 pound truck. The increase in damages was estimated to be $53 million and that was the damage figure adopted by the trial judge in this case. The revenues received from the HUE tax have all been appropriated for road construction and maintenance and expended. The truckers received extra profits with heavier weights.

In the refund proceedings in this case, the independent owner/operators have moved to be joined as a class for refunds asserting that their employer carriers forced them to pay the HUE tax. These owner/operators have requested that they should receive the refunds because they were billed by their employer for the tax.

The argument of the ATA is that the Arkansas trucker has an economic advantage as compared to non-Arkansas truckers under the HUE tax. However, on the list of truckers that the ATA used to assert a three to one mileage difference there appeared most of the large Arkansas trucking companies. Most Arkansas carriers license out of state. The ATA argues that out of state truckers paid the tax at an unconstitutional rate. However, they do not discuss that some out of state truckers paid the $175.00 maximum amount, at presumably an unconstitutional rate, but would receive a refund. It appears that the truckers are arguing in the courts the same argument they made in the legislature, "increase the truck weights but don't charge for

the increased maintenance costs." The equities are that the truckers received huge economic benefits and the taxpayers received the burden of maintenance repairs.

IV. REFUND DECISIONS

The *Scheiner* decision, determining flat taxes on trucks to be unconstitutional, impacted Pennsylvania [11], Arkansas [12] Indiana [13] and Kentucky [14]. Other flat taxes affected were fuel marker fees in Pennsylvania [15], Vermont [16]. New Jersey [17], Maryland [18], Maine [19], and Connecticut [20]. Additionally some states had "retaliated" against Pennsylvania's, Arkansas', Indiana's, and Kentucky's truck tax. These states had retaliatory taxes: Florida [21], Georgia [22], Maine [23], Nebraska [24], New Hampshire [25], New Jersey [26], Oklahoma [27] and Vermont. [28] West Virginia's and Washington's business and occupational taxes were declared unconstitutional by *Armco* and *Tyler Pipe*. West Virginia refused refunds and prospectively overruled because of the new precedent. [29] Washington did the same. [30]

Some of the decisions from all this litigation have resulted in a variety of refund decisions based on State laws

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11.
Pa. Cons. Stat. Ann. tit. 75 §9901 (Purdon Supp. 1986)

12
Ark. Code Ann. 27-35-205 (Repl. 1987)

13.
Ind. Code Ann. §6-6-8 (Burns Supp. 1986)

14.
Ky. Rev. Stat. Ann. §138.660 (4)-(7) (Baldwin Supp. 1986)

15.
Pa. Cons. Stat. Ann. tit. 75 § 2102 (Purdon 1981)

16.
Vt. Stat. Ann. tit 23 §§ 415, 3007, 3010 (Supp. 1982 and 1986)

17.
N.J. Stat. Ann. §54:39A-10 (West Supp. 1986)

18.
Md. Transp. Code Ann. §13-423(a) (1984)

19.
Me. Rev. Stat. Ann. tit. 29 §246-A (Supp. 1981)

20.
Conn. Gen. Stat. Ann. §12-487 (West 1983)

21.
Fla. Stat. Ann. §207.004(5)(d) (West Supp. 1986)

22.
Ga. Code Ann. §40-2-111 (1985)

23.
Me. Rev. Stat. Ann. tit. 29 §2243 (Supp. 1985)

24.
Neb. Rev. Stat. §60-305.03 (1984)

25.
N.H. Rev. Stat. Ann. §260:53 (1982)

26.
N.J. Stat. Ann. §39:3-6 (West 1973)

27.
Okla. Stat. Ann. tit. 47 §1120 (West Supp. 1985)

28.
Vt. Stat. Ann. tit. 23 §417 and 3021 (Supp. 1982 and 1985)

29.
Armco, Inc. v. Hardesty, supra. The refund case is *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986) Appeal dism'd for lack of jurisdiction, 107 S.Ct. 1949 (1987)

30.
Tyler Pipe Indus. v. Washington Dept. of Revenue, supra. The refund case is *National Can Corp. v. Dept. of Revenue*, supra.

such as decisions applying state Sovereign Immunity [31], refunding impounded funds [32], and decisions denying refunds because of voluntary compliance with the tax [33].

The Arkansas Supreme Court has refunded unconstitutional taxes from the date of inception of the tax [34], from the date of litigation [35], or prospectively overruling the tax in the future [36]. These refund decisions are more appropriate administered by state courts applying the principles established in *Chevron v. Huson*, supra.

31.
ATA v. Conway, 508 A.2d 405 and 408 (VT. 1986) cert. denied; 107 S.Ct. 3262 (1987).

32.
Private Truck Council of America, Inc. v. New Hampshire, 517 A.2d 1150 (N.H. 1986). Retaliatory tax declared unconstitutional and refunds paid from impounded funds only. Retroactive application denied because of lack of proof of involuntary payment.

33.
Private Truck Council of America, Inc. v. New Jersey, 534 A.2d 13 (N.J. 1987). New Jersey refunded its unconstitutional retalitory tax from the date of litigation deciding that the litigation date was when protesting an involuntary tax would begin; *Continental Trailways v. Director*, 509 A.2d 769 (N.J. 1986) cert. dism'd per stipulation 107 S.Ct. 1636 (1987). An excise tax refund was refused because Trailways paid the tax on mistake of law and therefore voluntarily paid the tax; and *Private Truck Council v. Sec. of State*, 503 A.2d 214 (Me. 1986) cert. denied 476 U.S. 1129 (1986) ruled that the taxes were voluntarily paid and ordered no refunds except for impounded funds.

34.
Ragan v. Venhaus, 289 Ark. 265, 711 S.W.2d 462 (1986)

35.
City of Little Rock v. Cash, supra.

36.
Sp. Sch. Dist. of Ft. Smith v. Sebastian Co., 277 Ark. 326, 641 S.W.2d 702 (1982) where a county school tax was declared prospectively unconstitutional, without refunds and not to take effect until the end of 1983 with tax collection to be made through the fall of 1984.

In conclusion, Arkansas submits that when an established tax is declared unconstitutional, there is a great deal of sorting out that must occur. As the State of Washington viewed its tax differently from West Virginia, Arkansas viewed its tax as substantially different from Pennsylvania.

The Arkansas HUE tax collection year began in June. Mailouts occurred earlier, however tax revenues and qualifications would not be received or sent until June 1. The $18 million that the ATA asserts Arkansas collected after the *Scheiner* decision is incorrect. Included in the $18 million are revenues collected during June, 1987, for the fiscal year 1986-87 and revenues for the 1987-88 year collected before June 23, 1987.

The decision by the Arkansas Supreme Court partially refunding the HUE tax and awarding attorney fees is an excellent resolution of the new precedent established by *Scheiner*.

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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October 1988

APPENDIX A

27-35-203. Single and tandem axle load limits.

(a) Maximum Single-Axle Load. The total gross load imposed on the highway by the wheels of any one (1) single axle of a vehicle shall not exceed twenty thousand pounds (20,000 lbs.).

(b) Maximum Tandem-Axle Load. (1) The total gross load imposed on the highway by two (2) consecutive axles in tandem articulated from a common attachment or individually attached to the vehicle, and spaced not less than forty inches (40") nor more than ninety-six inches (96") apart, shall not exceed thirty-four thousand pounds (34,000 lbs.).

(2) No one (1) axle of any such group of two (2) consecutive axles shall exceed the load permitted for a single axle.

(c) Maximum Weight on Front or Steering Axle. (1) The maximum weight imposed on the highway by the front steering axle of a vehicle shall not exceed twelve thousand pounds (12,000 lbs.).

(2)(A) The Director of State Highways and Transportation shall issue special permits for a maximum single front or steering axle weight not to exceed eighteen thousand pounds (18,000 lbs.) and a maximum tandem front or steering axle weight of not to exceed thirty-two thousand pounds (32,000 lbs.) for vehicles of special design, equipment, or construction, engaged in occasional or specialized heavy hauling such as, but not limited to, hauling of heavy machinery, commodities which require specialized equipment, oil or gas field equipment, or similar equipment, for a period of not more than one (1) year, upon application containing satisfactory proof that the vehicles are used solely for the above purposes.

(B) Permits may contain limitations upon speed of operation that the director may deem necessary for safety.

(3) The permits authorized under this subsection shall apply only to the front or steering axle and shall not affect the requirement of § 27-35-210 that special permits be obtained for vehicles exceeding other maximum size or weight limitations imposed in this subchapter.

(d)(1) Subject to the limit upon the weight imposed upon the highway through any one (1) axle as set forth in subsections (a), (b), and (c) of this section, no vehicle, or combination of vehicles, shall be operated upon the highways of this state when the gross weight is in excess of eighty thousand pounds (80,000 lbs.).

(2)(A)The foregoing maximum gross weights shall be applicable to vehicles, or combinations of vehicles, operated on highways in this state that are a part of the federal interstate highway system or that have been designated by the State Highway Commission as primary highways.

(B) On all other highways in this state, the maximum gross weight of any vehicles, or combinations thereof, shall not exceed sixty-four thousand pounds (64,000 lbs.).

(3)(A) However, vehicles, or any combination of vehicles, of a gross weight in excess of sixty-four thousand pounds (64,000 lbs.) and not in excess of seventy-three thousand two hundred eighty pounds (73,280 lbs.) may operate upon the secondary highways of the state at a speed not in excess of forty (40) miles per hour.

(B) Vehicles, or any combination of vehicles, of a gross weight in excess of seventy-three thousand two hundred eighty pounds (73,280 lbs.) and not in excess of eighty thousand pounds (80,000 lbs.)

operating on the secondary highways of the state shall also be limited to a maximum speed of forty (40) miles per hour.

(4) Greater gross weights than permitted may be authorized by special permit issued by competent authority as authorized by law, or lesser gross weights will be required when highways are posted.

(e)(1) No vehicle, or combination of vehicles, shall operate upon any highway in this state when the gross weight of the vehicle, or combination thereof, is in excess of seventy-three thousand two hundred eighty pounds (73,280 lbs.) unless the vehicle, or combination thereof, shall not exceed the value given in Table I corresponding to the distance in feet between the extreme axles of the group, measured longitudinally to the nearest foot.

(2) All vehicles desiring to operate with the increased axle weight as provided by this subsection must comply with the formula in Table I.

Table I

GROSS WEIGHTS ALLOWABLE UNDER THE FORMULA CONTAINED IN THE FEDERAL WEIGHT LAW ENACTED JANUARY 4, 1975, THAT ARE APPLICABLE TO VEHICLES OR COMBINATIONS THEREOF IN ARKANSAS FOR GROSS WEIGHTS IN EXCESS OF 73,280 POUNDS

FORMULA $W = 500 \dfrac{LN}{N - 1 + 12N + 36}$

Except that two (2) consecutive sets of tandem axles may carry a gross load of thirty-four thousand pounds (34,000 lbs.) each, providing that the overall distance between the first and last axles of the consecutive sets of tandem axles is thirty-six feet (36') or more.

W – maximum weight in pounds carried on any group of two (2) or more axles computed to the nearest five hundred pounds (500 lbs.).
L – distance in feet between the extremes of any group of two (2) or more consecutive axles.
N – number of axles in group under consideration.

Distance in feet between the extremes of any group of 2 or more consecutive axles	Maximum load in pounds carried on any group of 2 or more consecutive axles		
	4 axles	5 axles	6 axles
33			74,000
34			74,500
35			75,000
36			75,500
37			76,000
38			77,000
39			77,500
40			78,000
41		73,500	78,500
42		74,500	79,000
43		75,000	80,000
44		75,500	80,000
45		76,000	80,000
46		77,000	80,000
47	73,500	77,500	80,000
48	74,000	78,000	80,000
49	74,500	78,500	80,000
50	75,500	79,500	80,000
51	76,000	80,000	80,000
52	76,500	80,000	80,000
53	77,500	80,000	80,000
54	78,000	80,000	80,000
55	78,500	80,000	80,000
56	79,000	80,000	80,000
57	80,000	80,000	80,000

(3)(A) If the Federal Highway Administration or the United States Congress prescribes or adopts vehicle

size or weight limits greater than those prescribed by the Federal-Aid Highway Act of 1956 which limits exceed, in full or in part, the provisions of subsections (a), (b), (c), (d), or (e), the State Highway Commission shall adopt size and weight limits comparable to those prescribed or adopted by the Federal Highway Administration or the United Staes Congress and shall authorize the limits to be used by owners or operators of vehicles while the vehicles are using highways within this state.

(B) No vehicle size or weight limit so adopted by the commission shall be less in any respect than those provided for in subsections (a), (b), (c), (d), or (e) of this section.

(f)(1)(A) Vehicles, or a combination of vehicles, transporting products commonly recognized in interstate commerce at gross weights exceeding seventy-three thousand two hundred eighty pounds (73,280 lbs.) shall be permitted direct access across any highway in this state to or from the nearest federal interstate highway or the nearest state primary highway.

(B) Vehicles, or combinations thereof, shall be subject to the limits set forth in subsections (a), (b), (c), (d), (e), and (g).

(2) Where more than one (1) highway in this state affords access to or from the point of shipment or receipt within this state, the State Highway Commission may designate the access route to or from the nearest federal interstate highway or state-designated primary highway.

(g)(1)(A) Vehicles, or combinations of vehicles, with five (5) axles hauling unfinished and unprocessed farm products, forest products, or other products of the soil from the point of production, harvesting, or severance to the point in this state at which they shall first undergo any processing, preparation for processing, conversion, or transformation from their

raw, natural, or severed state shall be permitted an eight percent (8%) variance above the allowable gross weight whenever the formula in subsection (e) is applied to the vehicle or combination of vehicles.

(B) Vehicles, or combinations of vehicles, with five (5) axles and used exclusively by the owner of livestock or poultry for hauling animal feed to the owner's livestock or poultry for consumption in this state shall be permitted an eight percent (8%) variance above the allowable gross weight whenever the formula in subsection (e) is applied to the vehicle or combination of vehicles.

(C) A maximum gross weight, including any allowable variance or tolerance, shall not exceed eighty thousand pounds (80,000 lbs.).

(2)(A) Vehicles, or a combination of vehicles, meeting all of the requirements of this subsection shall not be required to meet the tandem axle load limits of subsection (b) of this section if the vehicles, or combinations thereof, do not exceed the allowable gross weight permitted by the formula in subsection (e) of this section, plus any variance, and do not exceed a gross weight of eighty thousand pounds (80,000 lbs.).

(B)(i) No tandem axle shall exceed thirty-six thousand five hundred pounds (36,500 lbs.) under this subsection.

(ii) No variance on gross weight or axle shall be permitted on federal interstate highways.

(iii) When a violation of this subsection occurs, fines and penalties shall be assessed without regard to any variance on gross weight or axle weight that may be applicable.

(h)(1) When any axle, including any enforcement tolerance, is overloaded but the total weight of all axles, including the steering axle, does not exceed the maximum

total weight allowed for all axles including the steering axle, the operator shall be permitted to unload a portion of the load or to shift the load if this will not overload some other axle, without being charged with violating this section and without being required to pay the penalties provided by law.

(2) The maximum axle load provided for in this section is subject to reduction as provided in §§ 27-35-101 – 25-35-103.

(i)(1) Vehicles, or combinations of vehicles, with five (5) axles hauling sand, gravel, rock, or crushed stone shall be exempt from the federal bridge formula found in subsection (e) of this section on noninterstate highways in this state.

(2) Such vehicles must comply with the tandem axle limit of thirty-four thousand pounds (34,000 lbs.) and the single axle limit of twenty thousand pounds (20,000 lbs.).

(j) Any operator found violating the provisions of subsection (d) prohibiting the operation of vehicles, or combination of vehicles, of a gross weight in excess of sixty-four thousand pounds (64,000 lbs.) and not in excess of eighty thousand pounds (80,000 lbs.) upon the secondary highways of the state at a speed in excess of forty (40) miles per hour, or any owner, principal, employer, lessor, lessee, agent, or officer of any firm or corporation who permits such operator to violate these provisions, shall be guilty of a misdemeanor as prescribed in § 27-35-202 and shall, in addition, pay a penalty, to be computed as prescribed in § 27-35-202, for all weight loads in excess of sixty-four thousand pounds (64,000 lbs.).

APPENDIX "B"

27-35-204. Compliance with Highway Use Equalization Tax Law.

Any motor vehicle, registered in Arkansas at the maximum registration fee for sixty-eight thousand one pounds (68,001 lbs.) to seventy-three thousand two hundred eighty pounds (73,280 lbs.) as provided in § 27-14-601, or any motor vehicle registered in any other state to carry in excess of seventy-three thousand two hundred eighty pounds (73,280 lbs.) shall be authorized to operate in this state with a gross weight of up to eighty thousand pounds (80,000 lbs.) in accordance with §§ 27-35-107, 27-35-203, 27-35-206, and 27-35-208, if the vehicle complies with the appropriate subsections of § 27-35-205, the Highway Use Equalization Tax Law.

27-35-205. Highway use equalization tax.

(a) As used in this section, unless the context otherwise requires:

(1) "Department" means the Director of State Highways and Transportation;

(2) "Division" means the Director of the Department of Finance and Administration;

(3) "Motor vehicle" means all cargo vehicles required to be registered for use upon the public highways of this state, which are designed, used, or maintained primarily for the transportation of property and having a declared gross weight of seventy-three thousand two hundred eighty-one pounds (73,281 lbs.) or more. For the purpose of this section, truck tractors, single unit trucks, semitrailers, and trailers operated in combination thereof shall constitute a single vehicle. The person having the use or control, or the right to use or control, of the part of such a vehicle furnishing the

motive power is the highway user with respect to the entire vehicle and is, accordingly, subject as such to the provisions of this section;

(4) "Truck" includes the terms "truck" or "truck tractor" and "semi-trailer" or "trailer" when operated in combination with a truck or truck tractor;

(5) "User" includes any person having the use and control, or the right to the use and control, of any motor vehicle;

(6) "Highway" includes all highways, roads, and streets of this state generally open to the use of the public as a way for vehicular traffic;

(7) "Gross weight" means the actual weight of the truck or truck tractor, plus the actual weight of the heaviest semitrailer or trailer or combinations thereof with which it is to be operated in combination plus the actual weight of the heaviest load to be carried thereon.

(8) "Arkansas registered vehicle" or "Arkansas registered truck" means a vehicle registered in Arkansas by a user who is an Arkansas resident and bearing an Arkansas license plate.

(b)(1) A tax is imposed upon all users of motor vehicles in compensation for the use of the highways of this state to be known as the "Highway Use Equalization Tax."

(2) Such tax shall be in addition to all other taxes required to be paid on such vehicles except as provided in this section.

(c) The Highway Use Equalization Tax shall not apply to any motor vehicle whose declared gross weight, as defined in subsection (a) above, is seventy-three thousand two hundred eighty pounds (73,280 lbs.) or less; nor to

vehicles used exclusively in hauling unfinished and unprocessed farm products, forest products, clay minerals, or ores from the point of production, harvesting, or severance to the point at which they shall first undergo any processing preparation for processing, conversion, or transformation from their raw, natural, or severed state; nor to vehicles used exclusively for hauling animal feed by owners of livestock or poultry for consumption by livestock or poultry owned by them; nor to any vehicle owned and operated by the federal government, or the State of Arkansas, or any political subdivision thereof.

(d) The provisions of this section shall not apply to any motor vehicle used on an interstate trip with an origin or destination within ten (10) miles of the geographic boundaries of this state, if the one-way travel distance in the state is not over ten (10) miles.

(e)(1)(A) The user of every vehicle subject to this section which is an Arkansas registered vehicle, before operating such vehicle over the highways of this state, shall qualify such vehicle with the division.

(B)(i) Qualifications shall be made by application to the division on forms to be provided by the division.

(ii) The application may be filed with the division at the time of registration of the vehicle.

(2)(A) Such application shall be accompanied by payment to the division of a fee of five dollars ($5.00), to be deposited into the Constitutional and Fiscal Agencies Fund, which fee shall cover the clerical cost of such qualification.

(B)(i) Upon receipt of such application and payment of the tax as determined in this section, the division shall make appropriate record of the vehicle qualified and certify such qualification on the applicant's registration certificate or a registration cab card, one of

which is to be carried in the cab of the vehicle at all times.

(ii) The registration certificate or registration cab card, in addition to the registration information and the required certification, shall show the amount of tax paid for such vehicle as determined by subsection (f) of this section.

(f)(1)(A) At the time of qualification of any Arkansas registered truck subject to this section which is registered through the International Registration Plan, the division may fix a mileage rate in cents per mile for each truck so registered and qualified.

(B)(i) The division shall determine the mileage rate, utilizing the gross weight declared in the application for registration of the truck, according to the following table:

Vehicle Weight (pounds)	Mileage Rate (dollars)
73,281 – 80,000	$0.05

(ii) The tax determined under this provision for every truck subject thereto shall be in the amount of the determined mileage rate multiplied by each mile the truck is operated over the highways of this state, as reported to the division for registration under the International Registration Plan.

(2)(A) At the time of the qualification of any Arkansas registered truck subject to the provisions of this section, every user not registered through the International Registration Plan shall pay, and every user registered through the International Registration Plan may elect to pay, an annual mileage tax in lieu of an amount determined by the applicable mileage rate set forth by subdivision (f)(1) of this section.

(B) The division shall determine such annual mileage tax by utilizing the gross weight declared in the application for registration of the truck, according to the following table:

Vehicle Weight (pounds)	Annual Tax (dollars)
73,281 – 80,000	$175

(g)(1) The tax, as determined by either subdivision (f)(1) or subdivision (f)(2) of this section, shall become due and payable at the time of registration.

(2) No license shall be issued, nor operation authority granted, to any Arkansas registered user subject to the provisions of this subchapter until such time as the full amount of the tax determined to be due under the provisions of this section, together with all penalties, shall have been paid.

(h) The division is authorized to collect those taxes and fees imposed by this section upon the Arkansas registered users subject to the provisions of this subchapter, to make timely deposits into the State Treasury of all moneys collected by the division, and to administer the provisions of this section as they pertain to Arkansas registered users, including the right to inspect and audit, at reasonable times at any place within this state, the books, records, and documents of any Arkansas registered users required to pay the Highway use Equalization Tax imposed by this section.

(i) (1)(A) The user of any vehicle subject to the provisions of this section, in lieu of qualification in accordance with the provisions of subsection (e) of this section, may remit to the department either an annual mileage tax in an amount determined by subdivision (f)(2) of this section or pay an amount determined by the applicable mileage rate set forth in subdivision (f)(1) of this section or pay a trip permit fee.

(B)(i) It is the intent of this subchapter that all users subject to the provisions of this section must either qualify with the division as provided in subsection (e) of this section and pay the appropriate taxes or comply with the provisions of this subsection.

(ii) All Arkansas registered vehicles must qualify with the division and remit such taxes to the division.

(2)(A)(i) If the user elects to pay the annual mileage tax, the department, upon application thereof and receipt of the payment, shall issue an annual mileage tax certificate to the user which shall be affixed to the cab of the vehicle by the user.

(ii) If the user elects to pay an amount determined by the applicable mileage rate set forth in subdivision (f)(1) of this section, the department shall utilize the appropriate rate multiplied by each mile the vehicle was operated over the highways of this state for the preceding twelve-month period based on mileage records of the user acceptable to the department.

(B)(i) Upon payment of this amount, the department shall issue a certificate to the user, which shall be affixed by the user to the cab of the vehicle.

(ii) If the user elects to utilize a trip permit, trip permits for trucks with a gross weight of seventy-three thousand two hundred eighty-one pounds (73,281 lbs.) through eighty thousand pounds (80,000 lbs.) shall be issued at a fee of eight dollars ($8.00) for each one hundred (100) miles of travel, rounded to the nearest one hundred (100) miles, whether loaded or unloaded.

(iii) These permits shall be issued by the department in such forms as it deems appropriate.

(j)(1) The tax provided for in this section must be paid by the users of all applicable vehicles using the highways of this state.

(2) No reciprocal agreement or agreement of any nature heretofore or hereafter entered into between officials of this state and those of any other state may exempt any user of such vehicles using the highways of this state from the provisions of this section and payment of the tax levied by this section.

(k) Any user found operating any vehicle subject to the provisions of this section over the highways of this state without complying with this section, or without having available in or on the cab the appropriate certificate or trip permit required by this section, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of no less than two hundred dollars ($200) nor more than five hundred dollars ($500) for the first offense and of no less than five hundred dollars ($500) nor more than one thousand dollars ($1,000) for each subsequent offense.

(l) This section shall be liberally construed to effectuate its purposes.

(m)(1) All fees, taxes, penalties, and interest collected under the provisions of this section not specifically classified as constitutional and fiscal agencies funds shall be classified as special revenues and shall be deposited in the State Treasury.

(2) The net amount thereof shall be transferred by the State Treasurer on the last business day of each month:

(A) Fifteen percent (15%) of the amount to the County Aid Fund;

(B) Fifteen percent (15%) of the amount to the Municipal Aid Fund; and

(C) Seventy percent (70%) of the amount to the State Highway and Transportation Department Fund.

(3) These funds are to be further disbursed in the same manner and used for the same purposes as is set out in the Arkansas Highway Revenue Distribution Law, § 27-70-201 et seq.

APPENDIX "C"

HIGHWAY USE EQUALIZATION TAX INFORMATION
AUTHORIZED BY ACT 685 OF REGULAR SESSION
74TH GENERAL ASSEMBLY 1983
REPEALED OCTOBER 9, 1987

	Final F.Y. 1983-1984	Final F.Y. 1984-1985	Final F.Y. 1985-1986	Final F.Y. 1986-1987	Final F.Y. 1987-10-9-87
ANNUAL DECAL COLLECTIONS [1]	$ 8,091,475.00	$10,768,975.00	$11,767,525.00	$12,950,350.00	$11,262,825.00
No. of Truck Owners	10,972	14,405	15,123	18,152	10,010
No. of Trucks Registered	46,237	61,537	67,243	74,002	64,359
MILEAGE DECAL COLLECTIONS [2]	$ 7,070,229.90	$ 9,223,528.39	$ 9,266,718.78	$10,118,993.10	$ 9,843,237.11
No. of Truck Owners	9,566	11,973	10,651	10,252	4,822
No. of Trucks Registered	177,084	175,934	170,632	171,132	157,830
Average Cost Per Truck	$39.92	$52.43	$54.31	$59.13	$62.37
TRIP PERMIT COLLECTIONS [3]	$ 5,782,698.00	$ 6,164,794.58	$ 6,393,451.02	$ 6,530,872.00	$ 1,394,920.00
No. of Trip Permits	297,510	318,977	327,162	337,160	72,559
Avg. Cost Per Trip Permit	$19.44	$19.33	$19.54	$19.37	$19.22
Avg. Trip Permits Per Day	838	873	896	924	718
TOTAL H.U.E. TAX COLLECTED (AHTD)	$20,944,402.90	$26,147,297.97	$27,427,694.80	$29,600,215.10	$22,500,982.11
Total No. of Truck Owners	20,538	26,378	25,774	28,404	14,832
Total No. of Trucks Registered	223,321	237,471	237,875	245,134	222,189
K-TAG H.U.E. TAX COLLECTIONS [4]	$ 1,850,156.00	$ 1,493,516.16	$ 1,454,250.00	$ 1,421,175.00	$ 896,052.00
Arkansas Licensed	8,693	8,534	8,310	8,121	5,120
GRAND TOTAL TRUCK TAX COLLECTED	$22,794,558.90	$27,650,814.13	$28,881,944.80	$31,021,390.10	$23,397,034.11
SPECIALTY CARRIER DECALS [5]	7,263	8,755	1,034	555	119

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APPENDIX "D"

6 7-35-204. Compliance with tax on vehicles weighing more than 73,280 pounds.

Any motor vehicle registered in Arkansas at the maximum registration fee for sixty-eight thousand one pounds (68,001 lbs.) to seventy-three thousand two hundred eighty pounds (73,280 lbs.), as provided in § 27-14-601(a)(3)(G), including any motor vehicle registered under the International Registration Plan at the maximum fee for its Arkansas-apportioned mileage or any motor vehicle registered in any non-IRP state to carry in excess of seventy-three thousand two hundred eighty pounds (73,280 lbs.), shall be authorized to operate in this state with a gross loaded weight of up to eighty thousand pounds (80,000 lbs.), in accordance with §§ 27-35-107, 27-35-203, 27-35-206, and 27-35-208(c), if the vehicle complies with the appropriate subsections of § 27-35-205 and the laws of this state concerning motor vehicle registration and licensing for the qualification year beginning July 1, 1988, and for each year thereafter.

27-35-205. Annual tax on vehicles weighing more than 73,280 pounds.

(a) As used in this section, unless the context otherwise requires:

(1) "Department" means the Arkansas State Highway and Transportation Department;

(2) "Motor vehicle" means all cargo vehicles required to be registered for use upon the public highways of this state designed, used, or maintained primarily for the transportation of property and having a declared gross weight of seventy-three thousand two hundred eighty-one pounds (73,281 lbs.) or more. For the purpose of this section, truck-tractors, single unit trucks, semitrailers, and trailers

operated in combination thereof shall constitute a single vehicle. The person having the use or control, or the right to the use or control, of the part of such a vehicle furnishing the motive power is the highway user with respect to the entire vehicle and is accordingly subject as such to the provisions of this section;

(3) "Truck" includes the terms "truck" or "truck-tractor" and "semi-trailer" or combinations of "trailers" or "semitrailers" when operated in combination with a truck or truck-tractor;

(4) "User" means any person or entity having the use and control, or the right to the use and control, of any motor vehicle. Use and control of a motor vehicle includes vehicles under a long-term lease and not vehicles under a trip lease;

(5) "Highway" includes all highways, roads, and streets of this state generally open to the use of the public as a way for vehicular traffic;

(6) "Declared gross weight" means the maximum gross weight at which a vehicle is authorized to operate, as shown on the vehicle license registration;

(7) "Gross weight" means the actual weight of the truck or truck-tractor, plus the actual weight of the heaviest semitrailier or trailer or combinations thereof with which it is to be operated in combination plus the actual weight of the heaviest load to be carried thereon;

(8) "Arkansas-registered vehicle" or "Arkansas-registered truck" means a vehicle registered in Arkansas by a user who is an Arkansas resident, and bearing an Arkansas license plate;

(9) "Net laden miles" means the total miles driven in Arkansas by the user vehicle less the total unladen miles traveled in Arkansas by the user vehicle; and

(10) "Unladen miles" means those miles traveled with the vehicle totally empty and free of cargo.

(B) It is the intent of the General Assembly that equipment, supplies, fixtures, and materials carried in or on a truck to be used in loading, unloading, covering, containing, packing or securing the cargo hauled or to be hauled shall not be considered cargo within the meaning of that term as used in the definition of unladen miles in subdivision (a)(10)(A) of this section. The terms "equipment, supplies, fixtures, and materials," as used in this section, shall include, but shall not be limited to, lifts, hoists, dollies, pallets, crates, coops, or other containers, covers, packing materials and supplies, chains, cables, braces, and blocks.

(b)(1) An annual tax is imposed upon all users, as defined in subdivision (a)(4) of this section, of motor vehicles, as defined in subdivision (a)(2) of this section, in compensation for the use of the highways of this state. The tax shall be in addition to all other taxes and fees now required to be paid on the vehicles.

(2) Any Arkansas-registered vehicle user who desires to haul in excess of seventy-three thousand two hundred eighty pounds (73,280 lbs.) shall notify the Arkansas Department of Finance and Administration at the time of license registration. The Arkansas Department of Finance and Administration shall then record the maximum declared gross weight on the vehicle license registration and notify the Arkansas State Highway and Transportation Department, in writing, of those vehicles registered in excess of seventy-three thousand two hundred eighty pounds (73,280 lbs.).

(c) The tax imposed by this section shall not apply to any motor vehicle with a declared gross weight, as defined in subdivision (a)(6) of this section, of seventy-three thousand two hundred eighty pounds (73,280 lbs.) or less,

nor to vehicles licensed exclusively for hauling unfinished and unprocessed farm products, forest products, and clay minerals and ores from the point of production, harvesting, or severance to the point at which they shall first undergo any processing, preparation for processing, conversion, or transformation from their raw, natural, or severed state, nor to vehicles used exclusively for hauling animal feed by owners of livestock or poultry for consumption by livestock or poultry owned by them, nor to any vehicle owned and operated by the United States of America or the State of Arkansas or any political subdivision of either.

(d) The provisions of this section shall not apply to any motor vehicle used on an interstate trip with an origin or destination within ten (10) miles of the geographic boundaries of this state if the one-way travel distance in this state is not over ten (10) miles.

(e)(1) The user of every vehicle subject to this section, before operating the vehicle over the highways of this state, shall annually qualify the vehicle with the department. Qualifications shall be made by application to the department on forms to be provided by the department. The department may accept applications from owners of leasing and rental companies that lease vehicles under long-term leases to customer lessees.

(2) Upon receipt of the application and payment of the tax as hereinafter determined, and in the manner hereinafter provided, the department shall make appropriate record of the vehicle qualified and certify the annual qualification on the applicant's tax cab card, one of which is to be carried in the cab of the vehicle at all times. The department shall also issue a decal to the user, which decal shall be affixed by the user to the cab of the vehicle.

(3) Any user qualifying a motor vehicle within his fleet shall be responsible for the removal of the decal and cab card when that vehicle is terminated from the user's

fleet. Failure to remove the decal and cab card, which shall be retained by the user as proof of removal, shall result in a penalty of twenty-five dollars ($25.00) per month for the remaining months of the qualification period after the vehicle was terminated from that user's fleet.

(f)(1) At the time of the qualification of any vehicle subject to this tax, the department shall apply the mileage rate, utilizing the gross weight declared in the application for the vehicle, according to the following table:

Vehicle Weight (pounds)	Mileage Rate (dollars)
73,281 – 80,000	$.025

(2) The tax determined under this provision for every vehicle subject to the tax shall be two and one-half cents ($.025) per mile for the net laden miles estimated to be traveled in Arkansas for the forthcoming twelve months, July 1 through June 30. At his option, pursuant to regulations promulgated by the department, the user may elect to make equal quarterly payments of his annual tax liability. Vehicles added to the fleet during the twelve-month qualification period must qualify by paying two and one-half cents ($.025) per mile for the estimated net laden miles to be traveled in Arkansas in the remainder of the qualifying year, in the manner allowed under regulations promulgated by the department. Underpayments and overpayments may be reconciled at the time of any quarterly estimate payment, or as otherwise allowed by regulation, based upon actual net laden miles traveled in the state during the qualification year with the mileage estimated for the year and an amended application submitted for refund or credit, or with any additional taxes due. Failure to make any quarterly payment as provided by regulation shall result in the cancellation by the department of the user's authority to operate any vehicle out of compliance with this section in this state. At the end of the qualification period, any user qualifying a motor vehicle with the department must submit to the department such

records as the department deems appropriate according to regulations promulgated by the department indicating the total number of miles traveled through the state, both laden and unladen, by the user's vehicle or vehicles. The summary records submitted by the user must be supported by source documents retained by the user. In all cases, specific records must be maintained by the user indicating the above information for every trip whether laden or unladen, pursuant to rules and regulations to be promulgated by the department. The mileage reports and records shall be subject to inspection and audit by the department in the same manner as other books, records, and documents of the user are subject to inspection and audit as provided by this section. Any claims made by the user on the applications and the initial acceptance by the department of those claims, for application purposes, does not preclude a later decision by the department based on specific audit findings during an audit of the user. Any user who shall falsify any records required by this section shall be guilty of a Class A misdemeanor.

(g)(1) The department is authorized to collect those taxes and fees imposed by this section upon all users subject to the provisions of this section, to make timely deposits into the State Treasury of all such moneys collected by the department, and to administer the provisions of this section, including the right to inspect and audit at reasonable times, at any place, without prior notice, the books, records, and documents of any user or other qualifying person required to pay the tax imposed.

(2) No assessment shall be made upon any user under the tax imposed by this section after the expiration of three (3) years from the date the user's application for qualification was made. However, in those cases where an application is deemed to have been fraudulently made, an assessment may be made for any prior qualification period or periods.

(3) Any user who neglects or refuses to pay the tax imposed by this section shall be liable for the full tax amount owed plus interest at the rate of ten percent (10%). If, at the end of the qualification period, based upon the difference between the estimated net laden miles and the actual net laden miles supported by the user's records, the liability exceeds twenty percent (20%), a ten percent (10%) penalty may also be imposed. Any user making quarterly payments who fails to make the quarterly payments, as provided by regulation, may be assessed, after hearing, a five percent (5%) penalty in addition to an interest charge to be calculated in the same manner as provided above.

(h) The user of any motor vehicle subject to the provisions of this section, in lieu of qualification in accordance with the provisions of subsection (e) of this section, may pay a trip permit fee. However, no Arkansas-registered vehicle shall be allowed to utilize a trip permit. The trip permit for trucks with a declared gross weight of seventy-three thousand two hundred eighty-one pounds (73,281 lbs.) through eighty thousand pounds (80,000 lbs.) shall be issued at a fee of eight dollars ($8.00) for each one hundred (100) miles. However, motor vehicle travel in the state, unladen, as that term is defined in subdivision (a)(10) of this section, shall be exempt from payment of the trip permit fee. The permits shall be issued by the department, pursuant to regulations to be promulgated by the department, on such forms as it deems appropriate and shall be retained by the user for a period of three (3) years as proof of payment of any liability determined through audit.

(i) The tax provided for in this section must be paid by the users of all applicable vehicles using the highways of this state. No reciprocal agreement or agreement of any nature heretofore or hereafter entered into between officials of this state and those of any other state may exempt any user of these vehicles using the highways of this state from the provisions of this section and the payment of the tax levied by this section.

(j) Any user, or other qualifying person, of any vehicle subject to the provisions of this section found operating over the highways of this state without complying with this section or without having available in or on the cab of the vehicle the appropriate cab card and decal or trip permit required by this section shall be guilty of a misdemeanor. Upon a conviction, the user of the vehicle or other qualifying person shall be punished by a fine of no less than one hundred dollars ($100) nor more than two hundred dollars ($200) for the first offense, and of no less than two hundred ($200) nor more than five hundred dollars ($500) for the second offense, and of no less than five hundred dollars ($500) nor more than one thousand dollars ($1,000) for each subsequent offense.

(k) The annual tax imposed on all users of motor vehicles shall be applicable for the qualification year beginning July 1, 1988, and ending June 30, 1989, and for each year thereafter.

(l) This section shall be liberally construed to effectuate the purposes thereof.

(m)(1) All fees, taxes, penalties, and interest collected under the provisions of this section shall be classified as special revenues and shall be deposited in the State Treasury. After deducting therefrom the amount to be credited to the Constitutional Officers Fund and the State Central Services Fund as provided in the Revenue Stabilization Law, § 19-5-101 et seq., the Treasurer of State shall transfer on the last business day of each month:

(A) Fifteen percent (15%) of the amount thereof to the County Aid Fund;

(B) Fifteen percent (15%) of the amount thereof to the Municipal Aid Fund; and

(C) Seventy percent (70%) of the amount thereof to the State Highway Department Fund.

(2) The funds shall be further disbursed in the same manner and used for the same purposes as set out in the Arkansas Highway Revenue Distribution Law, § 27-70-201 et seq.

APPENDIX "E"

27-70-202.

(a) As used in this subchapter, unless the context otherwise requires, "highway revenues" means and includes the following special revenues:

(1) Fees for the registration and licensing of motor vehicles, levied and collected under §§ 27-14-305, 27-14-601, 27-14-603, 27-14-605, 27-14-702, 27-14-704, 27-14-709, 27-14-716, 27-14-717, 27-14-914, 27-14-915, subchapters 5, 11-15, 18, 19, and 21 of chapter 14 of this title, and chapter 15 of this title, except motor vehicle in-transit taxes and drive-out tag fees levied, respectively, under §§ 27-14-1805 and 27-14-2104;

(2) Taxes levied and collected under the Motor Fuel Tax Law, § 26-55-201 et seq., and the Special Motor Fuels Use Tax Law (or Special Motor Fuels Tax Law), § 26-56-101 et seq., commonly referred to, and denominated by the Director of the Department of Finance and Administration for tax distribution purposes, as the gasoline tax.

(b) For the purposes of this section, any penalties, fines, charges, or other amounts paid in connection with, or in lieu of, any of the foregoing enumeration shall be deemed, unless otherwise expressly provided for by law, to be highway revenues and shall be added to, and considered as a part of, the particular foregoing enumeration to which it shall respectively belong.

APPENDIX "F"

27-70-203. Deposit in State Apportionment Fund.

All highway revenues shall be deposited in the State Treasury to the credit of the State Apportionment Fund. After deducting the amount of uncollected checks and reserving the amount as shall be required to liquidate claims for taxes erroneously paid, the State Treasurer shall, on the last business day of each month, transfer these highway revenues in the amounts or proportions, and to the State Treasury funds, specified in § 27-70-205.

APPENDIX "G"

27-70-206. Distribution to state funds.

All highway revenues which are available for distribution during each fiscal year shall be transferred to the following State Treasury funds, and in the order specified, with transfers to be made monthly until all available revenues have been transferred:

(1) First, three percent (3%) of the amount thereof to the Constitutional and Fiscal Agencies Fund, there to be used for the purposes specified for the fund by the Revenue Stabilization Law of Arkansas, § 19-5-101 et seq.;

(2) Next, to the Gasoline Tax Refund Fund, such amount as the Director of the Department of Finance and Administration shall, from time to time, certify to the State Treasurer as being necessary to pay approved gasoline tax refund claims under the provisions of §§ 26-55-301 – 26-55-321 and 26-55-401 – 26-55-408, or other applicable law. However, the aggregate total amount of all transfers under this paragraph shall not exceed two million five hundred thousand dollars ($2,500,000) during any fiscal year.

(3) After meeting the requirements set out in the foregoing subdivisions, all remaining highway revenues which are available for distribution during each fiscal year shall be transferred in the following manner: Fifteen percent (15%) of the amount thereof, to the County Aid Fund; fifteen percent (15%) of the amount thereof, to the Municipal Aid Fund; and seventy percent (70%) of the amount thereof, to the State Highway and Transportation Department Fund.

NOV 10 PAGE 1

Supreme Court, U.S.
FILED
OCT 28 1988
SPANIOL, JR.
CLERK

No. 88-325

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

---

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

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REPLY BRIEF FOR THE PETITIONERS

The petition in this case presents two issues—whether the Supreme Court of Arkansas correctly denied retroactive effect to this Court's June 23, 1987 decision in *Scheiner*; and whether it correctly denied even prospective effect to *Scheiner*, by limiting the application of *Scheiner* to taxes collected after Justice Blackmun's August 14, 1987 escrow order. With respect to the former question, we suggested that this case is a paradigm of a recurring issue that is often likely to arise when a state tax is invalidated on federal grounds, so that this Court's consideration of the manner in which the *Chevron* test applies to flat highway taxes (an issue that alone is in litigation in five states and involves hundreds of millions

of dollars of *Scheiner*-based refund claims) will give courts guidance in numerous other circumstances that are bound to arise in the future. With respect to the post-*Scheiner* issue, we contend that the decision below, which conflicts with a decision of Maryland's highest court, so far departs from the duty of a state court to honor the decisions of this Court as to call for corrective action.

Respondents' opposition makes no claim that the issues presented herein are unimportant or otherwise unworthy of the Court's attention, but rather offers a series of assertions as to why the decision below was correct on the merits. While these contentions need not be resolved at the current stage of the litigation, we respond briefly to them to show that they afford no basis either to deny the petition or to affirm the judgment of the Arkansas Supreme Court.

1. Respondents begin by pointing out (Opp. 1-2) that while most states allowed trucks to operate at a weight of 80,000 pounds, prior to 1983 Arkansas had enforced a lower 73,280-pound limit, which made it a "barrier state" and seriously impeded the flow of interstate commerce. Not surprisingly, Arkansas' removal of this obstruction to commerce was of substantial benefit to interstate truckers.[1] Arkansas apparently contends that because this benefit exceeded the amount of the HUE tax adopted contemporaneously therewith, petitioners would be given a windfall if refunds of the unconstitutional tax were ordered. This argument completely overlooks the vice that proved to be fatal to the HUE tax, which was

[1] The State's decision to increase truck weight limits to 80,000 pounds was not motivated by the desire to facilitate interstate commerce, but rather by the fear that its lower limit would result in a complete loss of federal highway monies. See Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 133(a), 96 Stat. 2123 (1983) (codified as amended at 23 U.S.C. § 127 (1982)).

not that its size exceeded the benefits "conferred" by the cessation of Arkansas' disruption of commerce, but that it discriminated against out-of-state operators and in favor of Arkansas-based trucks (which, of course, also benefited from the increased weight limit). Whether petitioners derived benefit from being able to operate at heavier weights is wholly irrelevant to whether they are entitled to a refund of the unconstitutional taxes exacted from them.

2. Respondents next suggest (Opp. 3) that Arkansas' tax was different from the Pennsylvania taxes invalidated in *Scheiner*. It is not quite clear how the existence of differences in the taxes would be relevant here, but in fact there are *no* material differences between the HUE tax and the Pennsylvania axle tax: Both taxes discriminated in favor of in-state operators because they did not vary with the amount of highway use above a relatively low level—2,000 miles per year in the case of Pennsylvania, 3,500 miles in the case of Arkansas (see Pet. 25-26).

3. Respondents point out (Opp. 4) that even if this Court were to hold *Scheiner* fully retroactive, state law grounds such as sovereign immunity might bar a refund. While such a holding on remand would itself raise constitutional issues distinct from those presented here,[2] that is hardly a ground for denying certiorari to review the nonretroactivity ruling that is the subject of this petition.

4. Respondents then (Opp. 5-6) make a half-hearted attempt to suggest that the first prong of the *Chevron*

[2] Both *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), and *Ward* v. *Love County*, 253 U.S. 17 (1920), hold that the Fourteenth Amendment bars states from interposing sovereign immunity as a basis for withholding refunds of unconstitutional taxes. In fact, however, Arkansas appears to recognize a right under the state constitution to secure refunds in a case like this. See *Streight* v. *Ragland*, 280 Ark. 206, 209 n.6, 655 S.W.2d 459, 461 n.6 (1983); *City of Little Rock* v. *Cash*, 277 Ark. 494, 513, 644 S.W.2d 229, 237 (1982), cert. denied, 462 U.S. 1111 (1983).

test, which looks to the existence of justifiable reliance on old law by the proponents of nonretroactivity, is satisfied here because a number of other states had also adopted flat highway taxes and because this Court's decision in *Tyler Pipe* was held nonretroactive by the Supreme Court of Washington.[3] No effort is made to respond to our discussion of this point (Pet. 15-19). Respondents do not dispute that the state of the law regarding the constitutionality of flat taxes was at best (from the State's standpoint) uncertain when the HUE tax was adopted, that it is important to know who bears the risk of unconstitutionality when a state enacts a questionable tax statute, or that this case is an excellent vehicle for addressing that important question.[4]

5. Respondents address the second prong of the *Chevron* test (Opp. 6-8) by complaining that a judgment requiring payment of refunds will bring a halt to highway construction in Arkansas and by accusing petitioners of being unwilling to pay their fair share of taxes. These baseless assertions are quite irrelevant to the question whether retroactive application of *Scheiner* will advance Commerce Clause policies. In fact, if refunds are required, ATA has made clear its willingness to work with the respondents and the state courts to devise a means to pay them with minimum disruption to the State's highway maintenance program. See Reply Brief for Appellants in No. 85-101 (Ark. Sup. Ct.) at 14-16.[5] And Arkansas has already enacted a replacement truck tax which is generating millions of dollars for highway maintenance.

[3] We note in this connection that, subsequent to the filing of the petition in this case, the New Jersey Tax Court ruled on the retroactivity of *Scheiner*. *American Trucking Ass'ns* v. *Kline*, No. 07-14-1667-85MVT (Sept. 8, 1988). In a lengthy and thorough evaluation of the application of the *Chevron* test to flat highway taxes, that court concluded that not one of the three criteria for nonretroactivity was satisfied and held that *Scheiner* must be given full retroactive application.

[4] As we explain in the petition (at 17 n.13, 19-20 & n.15, 23), the situation in *National Can* was entirely different, both in terms of the legislative perspective at the time of enactment of the multiple activities exemption struck down in *Tyler Pipe* and in light of the fact that the taxpayers in that case, while exposed to the theoretical risk of multiple taxation, had suffered little or no actual injury and would, unlike petitioners, have paid the same amount of tax under a valid law as they had under the one that was struck down.

We argued that retroactive application of decisions like *Scheiner* is needed to discourage state legislatures from enacting constitutionally questionable laws that favor in-state business interests. Respondents reply that constitutional concerns are indeed at the forefront when state legislatures consider new laws and that any suggestion to the contrary shows contempt for the legislative process (Opp. 7-8). But the history of Arkansas highway taxes belies that assertion. When the current weight-distance tax, which replaced the HUE tax last October, was before the Arkansas legislature, the Attorney General of Arkansas rendered a formal opinion that certain exemptions contained therein were unconstitutional. (That opinion is reproduced as an Appendix hereto.) Two days later, the new tax passed, with the questionable exemptions intact and with no evidence that the least attention had been paid to the Attorney General's advice.

6. On the equities of retroactive application of *Scheiner*, respondents' argument (Opp. 8-9) is that petitioners benefited from Arkansas' federally-compelled abandonment of its "barrier state" role (see pp. 2-3, *supra*), that a ruling in petitioners' favor could produce refunds for some Arkansas carriers, and that truckers

[5] Indeed, much of the disruption predicted by respondents is dubious in any event, since the bulk of the funding for the construction of the major Arkansas thoroughfares travelled by trucks that weigh more than 73,280 pounds is supplied not by Arkansas but by federal grants.

prefer not to pay taxes. None of these reasons is at all relevant to *Chevron*'s third prong, let alone amounts to the kind of powerful inequity that might justify a refusal to give retroactive effect to a decision of this Court.

First, as noted above, the fact that the taxed activity is economically beneficial to the taxpayer simply sheds no light on whether refunds are required after a tax has been found unconstitutional. Second, the suggestion that some undeserving taxpayers would receive refunds is unpersuasive. It is not clear that federal law would require refunds to taxpayers who could be shown to have *benefited* from a discrimination; and even if it did, the numbers are small compared to the thousands of non-Arkansas carriers who suffered real and substantial economic injury from the discriminatory HUE tax. Third, whether or not truckers enjoy paying taxes, the trucking industry has never taken the position that it should not pay its fair share of highway construction and maintenance costs. Indeed, the petition recognizes (see Pet. 22) that any refunds that are required will likely be financed by taxes on trucks. Petitioners ask only that the taxes they pay not be infected by invidious discrimination or other constitutional defects.

7. Finally, respondents make no meaningful effort whatever to defend the validity of the decision of the Arkansas Supreme Court to permit the State to retain taxes paid, before establishment of the escrow, for the tax year beginning July 1, 1987. Their contention appears to be (see Opp 11-12) that state courts may decide for themselves, free from oversight by this Court, when to give effect to decisions holding state taxes unconstitutional. No doubt the decision to allow the State to retain millions of dollars of taxes exacted for road use *after* the date of the *Scheiner* decision is an "excellent resolution" (Opp. 12) from respondents' perspective, but it is also a

blatant disregard of the commands of federal law, which, we respectfully submit, calls for correction by this Court.

Respectfully submitted.

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APPENDIX

STATE OF ARKANSAS
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[SEAL]

STEVE CLARK
Attorney General

October 7, 1987

Honorable Bill Clinton
Governor of Arkansas
State Capitol Building
2nd Floor
Little Rock, AR 72201

Re: Proposed Weight Distance Truck Tax Legislation

Dear Governor Clinton:

I will be leaving the country on October 7 for a trip to Russia. In light of that, I thought it prudent that I review the proposed bills and apprise you of my thoughts regarding the proposed truck tax legislation as submitted by the Arkansas Highway and Transportation Department, the Arkansas Poultry Federation, and the Arkansas Bus and Truck Group. As you know the U.S. Supreme Court's decision in *ATA v. Scheiner*, declared unconstitutional the flat tax legislation in Pennsylvania which is similar in many respects to the provisions of Arkansas' Act 685 of 1983. Our highway use tax is under constitutional attack and now pending in the State Supreme Court after remand from the U.S. Supreme Court in the case of *ATA v. Gray*.

What is needed now is a tax that does not in any respect discriminate or violate the Equal Protection Clause as applied to various highway user groups. Considerable attention must be directed to avoiding a violation of the Commerce Clause by not taxing in a disparate fashion out-of-state truckers versus domestic truckers.

The proposed legislation sponsored by the Arkansas Highway and Transportation Department would impose a 3¢ per mile tax on all loaded motor vehicles between 73,280 and 80,000 lbs. Unladened motor vehicles registered in that weight range would not be taxed. This tax is to apply across the board and does not appear to discriminate in any way against out-of-state carriers in favor of domestic carriers. Therefore, it seems to avoid the Commerce Clause issues inherent in the *Scheiner* case and implied by the U.S. Supreme Court in *ATA v. Gray*. The one possible problem with the bill proposed by the Arkansas Highway and Transportation Department is that it exempts from taxation any vehicles carrying unfinished and unprocessed products (including farm, forest and minerals) from the point of harvesting or severance from the land to the point where it first undergoes any processing. There appears to be no rational basis supporting this discrimination in favor of these products versus any other materials. To the extent that this tax does not favor domestic carriers versus foreign carriers, it would not appear to pose any Commerce Clause problems. Equal Protection problems are, however, inherent in the bill so long as it contains the aforementioned exemptions.

It appears to me that the legislation proposed by the Arkansas Poultry Federation is also constitutionally suspect. This proposed bill seeks to avoid taxation for farm, timber, or mineral products carried by heavy motor vehicles. While this bill would only exempt those products so long as they were not *fully* processed, the effect would

be to virtually exclude the poultry and timber industry from taxation in its transportation of those goods. It is difficult to conceive of a rational basis for exempting these products from taxation while continuing to levy the tax on all other products in the heavy motor vehicle class. It is significant to note that this is not a general revenue raising measure. Rather, it may be reasonably characterized as a use tax particularly designed and imposed to off-set specific costs incurred by the State in connection with the use of its highways. The emergency clause, contained in Section 11 of the proposed bill, exhibits this specific purpose in stating as follows:

> It is hereby found and determined by the General Assembly that the current highway-user tax and fee structure does not allocate highway costs in an equitable manner among the various classes of highway users, and that the increased weight limits enacted by the 74th Assembly has jeopardized the investment in the State's highways necessitating the annual expenditure of additional monies to negate such damage; and that only by the immediate passage of the Act may highway-user taxes and fees be adjusted to more equitably equalize the allocation of highway costs among the various classes of highway users and provide vitally needed additional funds to solve the aforementioned problems. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.

The Equal Protection Clause would, it seems, in this instance compel a showing that the exemptions proposed by the Arkansas Poultry Federation are rationally related to the objective sought to be achieved by the legislation, that is, the generation of revenues "in an equitable manner among the various classes of highway users." The exemptions set forth in the Arkansas Poultry Federa-

tion Bill would in all likelihood fail to withstand this review. I should note, however, that I see nothing inherently wrong with their proposed 2¢ per mile tax to be levied against all heavy trucks (over 73,280 lbs.).

Finally, the Arkansas Bus and Truck Group has proposed a bill that would tax the use of motor fuels by trucks depending on their loaded weight. It begins at 1¢ per gallon of motor fuel for trucks with a loaded weight between 40 thousand and 56 thousand pounds and goes to 5¢ per gallon for motor fuel used in trucks of gross loaded weight of over 73,280 lbs. This is the simplest of the proposed tax bills, and it seems least constitutionally suspect. I find nothing in this proposed bill to raise any constitutional red flags.

In summary, Governor, I believe that the proposed bill from the Arkansas Poultry Federation is based upon constitutionally unsound exemptions for enumerated industries in the State. The bill as proposed by the Arkansas Highway and Transportation Department seems constitutionally sound with the exception of the clause granting an exemption for natural resources in their unprocessed state. Finally, I see nothing constitutionally suspect with respect to the bill as proposed by the Arkansas Bus and Truck Group.

This letter is written to you solely as a statement of my position on the bills as proposed, with an eye toward avoiding further costly litigation and the problems inherent in the present Act 685 of 1983.

Sincerely,

/s/ Steve Clark
STEVE CLARK
Attorney General

Supreme Court, U.S.
FILED
MAR 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-325

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
RESPONDENTS

On Writ of Certiorari to the Arkansas Supreme Court

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PETITION FOR WRIT OF CERTIORARI FILED AUGUST 23, 1988
CERTIORARI GRANTED NOVEMBER 14, 1988

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-325

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
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v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
RESPONDENTS

On Writ of Certiorari to the Arkansas Supreme Court

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SUPREME COURT OF ARKANSAS

No. 85-101

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
APPELLANTS

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
APPELLEES

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * *
1986	
Apr 14	[Order of Chancery Court upholding constitutionality of HUE tax] Affirmed. Holt, C.J. Hickman, J., dissents, Pyrtle, J. not participating.
	* * * *
May 27	Petition for rehearing denied. Supplemental opinion rendered. Hickman, J. would grant Pyrtle, J. not participating.
June 17	Appellants' Notice of appeal to U.S. Supreme Court. Filed.
	* * * *
Sep 15	Notice from U.S. Supreme Court of filing of appeal on 9-3-86. Filed.
	* * * *

DATE	PROCEEDINGS
1987	
Jul 17	Mandate from U.S. Supreme Court. Filed.
	* * * *
Jul 20	Appellants motion to remand to Chancery Court upon receipt of mandate is denied. Hickman and Glaze, JJ., not participating.
Jul 24	Appellants' Motion for Temporary Relief. Served.
Jul 27	Appellees' [Arkansas State Highway Department] Response to Motion for Temporary Relief. Served.
Jul 27	Appellees' Response (State Treasurer) to Motion for Temporary Relief. Served.
	* * * *
Jul 27	Appellants' Reply to State Highway Department's Response to Motion for Temporary Relief. Served.
Jul 30	Appellants' Motion for Temporary Relief is Denied. Order #1.3-5 (Glaze, J., not participating).
Jul 30	Copy of Application for Injunction is Filed with U.S. Supreme Court. Filed.
	* * * *
Aug 4	Appellants' Motion for Leave to file a brief on behalf of Appellants. Served.
	* * * *
Aug 14	Motion to file brief on behalf of Appellants is granted.
Aug 20	U.S. Supreme Court opinion granting application for writ of injunction. Filed.
	* * * *

DATE	PROCEEDINGS
1988	
Jan 27	Motion of [Owner-Operators Independent Drivers Association] to intervene and for certification of subclass. Served.
	* * * *
Feb 8	Response to above motion. Served.
Feb 16	Motion of Owner-Operators Independent Drivers Assoc., Inc. to intervene and for certification of a subclass is denied. (Pyrtle, J., not participating).
	* * * *
Mar 7	Submitted and argued.
	* * * *
Mar 14	Reversed and Remanded. Newbern, J., Hickman, J., dissents in part.
	* * * *
Mar 31	Appellants' (ATA, et al.) Petition for Rehearing. Served.
	* * * *
Apr 11	State Highway response to petition for rehearing. Served.
Apr 25	Petition for rehearing is denied. Hickman, J., would grant.
	* * * *
Aug 30	Notice of filing Petition for Certiorari in U.S. Supreme Court on 8-23-88.
Nov 16	Notice from U.S. Supreme Court of order granting Petition for Writ of Ceritorari. Filed.

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. 83-2360

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS; AND ARKANSAS BUS AND TRUCK ASSOCIATION, INC., AND JONES TRUCK LINES, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS, PLAINTIFFS

vs.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; AND BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; JIMMY LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, DEFENDANTS

ORDER DENYING PRELIMINARY INJUNCTION

Now on this 29th day of July, 1983, comes on to be heard the above styled case with Plaintiffs requesting the Court to grant a Preliminary Injunction. From the testimony of the witnesses, briefs, and arguments of coun-

sel the Court denies Plaintiffs' Motion for Preliminary Injunction and dissolves the Order of June 1, 1983.

It is therefore ordered that Plaintiffs' Motion for Preliminary Injunction is denied unless Plaintiffs post bond or other surety in the amount of $53,000,000.00.

/s/ [Illegible]
Chancellor

8-1-83
Date

APPROVED:

/s/ [Illegible]
Attorney for Plaintiff

/s/ [Illegible]
Attorney for State Highway Defendants

/s/ Frederick K. Campbell
Attorney for State Treasurer

/s/ [Illegible]
Attorney for Department of Finance
and Administration

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. 83-2360

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, COMMERCIAL CARRIERS, INC., AND JOE FORTENBERRY, D/B/A FERNWOOD TRANSPORTATION, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS; AND ARKANSAS BUS AND TRUCK ASSOCIATION, INC., AND JONES TRUCK LINES, INC., AND LEON CAWOOD, D/B/A LEON CAWOOD TRUCKING, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS, PLAINTIFFS

vs.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; AND BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS, MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, DEFENDANTS

SECOND AMENDED COMPLAINT

[Filed Sept. 2, 1983]

Come now the Plaintiffs, individually and as the representatives of similarly situated classes of taxpayers pursuant to Rule 23 of the Arkansas Rules of Civil Procedure, and for their cause of action against Henry C. Gray, Director of the Arkansas Highway and Transportation Department; David Soloman; Ron Herrod; Patsy Lee Thomasson; Raymond Pritchett, Jr.; and Bobby Hopper, Members of the Arkansas State Highway Commission; Roy L. Johnson, Chief of the Arkansas Highway Police Division of the Arkansas Highway and Transportation Department; Charles D. Ragland, Commissioner of Revenues of the State of Arkansas; Jimmie Lou Fisher, Treasurer of the State of Arkansas and Mahlon Martin, Director of the Arkansas Department of Finance and Administration, Defendants, and do allege and state as follows:

PLAINTIFFS

1. Plaintiff American Trucking Associations, Inc. ("ATA") is a national non-profit corporation organized and operating under the non-profit corporation laws of the District of Columbia, and with its principal place of business located there. ATA is a federation of 51 trucking associations, of all states and the District of Columbia, and 13 national conferences. It represents every type and geographical scope of motor carrier operation in the United States, including over 10,000 interstate for hire carriers, and tens of thousands of private and local carriers, many of whose motor carrier vehicles are qualified for operation within the State of Arkansas and are subject to the requirements of Act 685 of 1983.

2. Plaintiff Transcon Lines, Inc. ("Transcon") is a corporation organized and existing under the laws of the State of California with its principal place of business located in El Segundo, California. Transcon is also registered and qualified to do, and is doing, business in the State of Arkansas as an interstate motor carrier as defined in the Interstate Commerce Act, operating under Certificates of Convenience and Necessity issued by the Interstate Commerce Commission. At present, all of Transcon's inter-city motor carrier vehicles are qualified

for operation within the State of Arkansas (and all 47 of the other contiguous states of the United States) and are subject to the provisions of Act 685 of 1983.

3. Plaintiff Diamond Transportation Systems, Inc. ("Diamond") is a corporation organized and existing under the laws of the State of Wisconsin with its principal place of business located in Racine, Wisconsin. Diamond's vehicles travel to, from and through Arkansas, though it maintains no offices or agents in Arkansas and is not qualified to conduct business in Arkansas as a foreign corporation, since its business activities are conducted strictly in interstate commerce. Diamond is an interstate motor carrier as defined in the Interstate Commerce Act, operating under Certificates of Convenience and Necessity issued by the Interstate Commerce Commission. At present, all of Diamond's motor carrier vehicles are qualified for operation within the State of Arkansas (and all 47 of the other contiguous states of the United States) and nearly all are subject to the provisions of Act 685 of 1983.

4. Plaintiff Rollins Leasing Corporation ("Rollins") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located in Wilmington, Delaware. Rollins' principal business is the full-service leasing of commercial motor vehicles to fleet operators from 125 branch offices located in 28 states. Rollins is the owner of approximately 8,100 leased motor carrier vehicles utilized by private carriers engaged in Interstate Commerce. These motor carrier vehicles are grouped into approximately 1,500 leased fleets and approximately 250 short-term rental fleets. At the present, a large number of the motor carrier vehicles owned by Rollins are subject to the provisions of Act 685 of 1983.

5. Plaintiff Commercial Carriers, Inc. ("Commercial") is a corporation organized and existing under the laws

of the State of Michigan with its principal place of business located in Southfield, Michigan. Commercial's principal business is the delivery of new and used motor vehicles to automobile dealers throughout the United States. Commercial is an interstate motor carrier as defined in the Interstate Commerce Act, and operates under Certificates of Convenience and Necessity issued by the Interstate Commerce Commission. Commercial is not registered to do business in the State of Arkansas, since all of its business activities are conducted strictly in the furtherance of interstate commerce. At present, all of Commercial's motor carrier vehicles are qualified for operation within the State of Arkansas (and all 47 of the other contiguous states of the United States) and are subject to the provisions of Act 685 of 1983.

6. Plaintiff Joe Fortenberry ("Fortenberry") is an individual, is a resident of the State of Mississippi, and operates an interstate trucking business as Joe Fortenberry, d/b/a Fernwood Transportation with his principal place of business located at Fernwood, Mississippi. Fortenberry's principal business is the transport of forest products throughout the states of the United States that lie east of the Rocky Mountains. Fotenberry is an interstate motor carrier as defined in the Interstate Commerce Act, and he operates under Certificates of Convenience and Necessity issued by the Interstate Commerce Commission. At the present, Fortenberry's trucks are qualified for operation within the State of Arkansas and are subject to the provisions of Act 685 of 1983.

7. Plaintiff Arkansas Bus and Truck Association, Inc. ("ABTA") is a non-profit corporation organized and exisitng under the laws of the State of Arkansas with its principal place of business at Little Rock, Arkansas. ABTA is a federation composed of 224 motor carriers and bus lines, of which approximately 135 motor carriers engaged in interstate commerce, whose motor carrier

vehicles are registered and based in the State of Arkansas.

8. Plaintiff Jones Truck Lines, Inc. ("JTL") is a corporation organized and existing under the laws of the State of Arkansas with its principal place of business located in Springdale, Arkansas. JTL is qualified to do, and is doing, business in the State of Arkansas as an interstate motor carrier as defined in the Interstate Commerce Act, operating under Certificates of Convenience and Necessity issued by the Interstate Commerce Commission. At present, all of JTL's intercity motor carrier vehicles are qualified for operation within the State of Arkansas (and at least 14 of the other states of the United States, including the states of Georgia, Oklahoma and Nebraska) and are subject to the provisions of Act 685 of 1983.

9. Plaintiff Leon Cawood ("Cawood") is an individual, is a resident of the State of Arkansas, and operates an interstate trucking business as Leon Cawood, d/b/a Leon Cawood Trucking with his principal place of business located at Springdale, Arkansas. Cawood's principal business is the transport of exempt commodities throughout the United States. At the present, Cawood's trucks are qualified for operation within the State of Arkansas and are subject to the provisions of Act 685 of 1983.

DEFENDANTS

10. Defendant Henry C. Gray is the duly appointed and acting Director of the Arkansas State Highway and Transportation Department and a resident of Pulaski County, Arkansas.

11. Defendants David Soloman, Ron Herrod, Patsy Lee Thomasson, Raymond Pritchett, Jr. and Bobby Hooper constitute the entire membership of the Arkansas State Highway Commission. Defendant Soloman is a

resident of Phillips County, Arkansas. Defendant Herrod is a resident of Nevada County, Arkansas. Defendant Thomasson is a resident of Cleveland County, Arkansas. Defendant Pritchett is a resident of Pulaski County, Arkansas. Defendant Hooper is a resident of Washington County, Arkansas. The Arkansas Highway Commission and the Arkansas Highway and Transportation Department are an independent commission and an independent department established by Amendment 42 to the Arkansas Constitution. The Commission and its members are charged with the responsibility for enforcing laws of Arkansas related to the Highway system of this state, including the provisions of Act 685 of 1983. Defendant Roy L. Johnson is the Chief of the Arkansas Highway Police Division of the Arkansas Highway and Transportation Department. Defendant Johnson is a resident of Pulaski, County, Arkansas.

12. Defendant Charles D. Ragland is the duly appointed and acting Commissioner of Revenues of the State of Arkansas and a resident of Pulaski County, Arkansas.

13. Defendant Jimmie Lou Fisher is the duly elected and acting Treasurer of the State of Arkansas and the chief financial officer of this State. Defendant Fisher is a resident of Pulaski, County, Arkansas.

14. Defendant Mahlon Martin is the duly appointed and acting Director of the Arkansas Department of Finance and Administration and a resident of Pulaski County, Arkansas.

15. In their respective capacities, the Defendants named in paragraphs 6 through 11, above, are the individuals empowered by law to administer and enforce the provisions of Act 685 of 1983, which Act is herein challenged. Each of the above Defendants is a citizen and resident of the State of Arkansas.

CLASS ACTION

16. Plaintiffs bring this action on behalf of themselves and, pursuant to Rule 23 of the Arkansas Rules of Civil Procedure, all other taxpayers who are similarly situated, to test the legality and constitutionality of the various provisions of Act 685 of 1983 and to protect the affected classes of taxpayers against the enforcement of illegal exactions. The affected taxpayers form (1) a class of in excess of 10,000 intercity motor carriers that are similarly situated and (2) all Arkansas based intercity motor carriers that are similarly situated. These two (2) classes of Plaintiffs are so large that it is impractical to bring them all before this Court within a reasonable time. The certification of this action as a class action will avoid a multiplicity of possibly conflicting adjudications on the same issue. There are questions of law and fact presented herein which are common to the entire group of both classes of taxpayers. The claims of the Plaintiffs herein are typical of the claims of the above-described classes. Plaintiffs will fairly and adequately protect the interest of both classes and will prosecute this action for the benefit of all members of both classes.

CAUSES OF ACTION

17. This is an action to have declared as an illegal exaction, under Article 16 Section 13 of the Constitution of the State of Arkansas, the collection from Plaintiffs and all other similarly situated taxpayers of the "Arkansas Highway Use Equalization Tax" imposed by various provisions of Act 685 of 1983; to order an accounting of taxes collected from Plaintiffs and all similarly situated taxpayers of the amount of the illegally exacted tax that has been collected to date, and to place all subsequently collected monies under the provisions of Act 685 of 1983 in a special interest bearing account outside of the General Fund or designated Special Revenue Funds of the State pending the outcome of this proceeding, and to

order the refund of these illegally exacted amounts, plus interest, to each member of the class. Plaintiffs also seek to have declared unconstitutional under both the United States and Arkansas Constitutions the various provisions of the Act 685 of 1983 for the reasons below set forth. This Court's jurisdiction is founded upon Article 16 Section 13 of the Constitution of the State of Arkansas.

18. Alternately, the Court has jurisdiction of this action under 42 U.S.C. § 1983 in that Act 685 of 1983 deprives plaintiffs of rights, privileges, and immunities secured by the Constitution and laws of the United States of America.

19. Alternatively, the Court has jurisdiction of this action under the provisions of Ark. Stat. Ann. § 34-2501 and Rule 57 of the Arkansas Rules of Civil Procedure, inasmuch as the implementation of Act 685 of 1983, as currently proposed by the Defendants, will illegally deprive the Plaintiffs and all similarly situated taxpayers of monies which they will not owe to the State of Arkansas, and thus a real case and controversy exists for determination of the parties' rights pursuant to a declaratory judgment.

20. On March 23, 1983 the Honorable Bill Clinton, Governor of Arkansas, approved Senate Bill 220 as passed by the 74th General Assembly of the State of Arkansas, said Senate Bill 220 then becoming Act 685 of 1983, the provisions of which are to become effective on and after July 1, 1983. (A copy of Act 685 of 1983 is attached as Exhibit A to the original Complaint.) Plaintiffs and other taxpayers similarly situated became subject to "emergency" Regulations (on or about April 20, 1983) and "final" Regulations (on or about July 8, 1983) issued by the Arkansas State Highway and Transportation Department, promulgated for the purpose of implementing the provisions of Act 685 of 1983. The Plaintiffs and all other similarly situated citizen taxpayers became sub-

ject to "emergency" Regulations (on or about April 14, 1983) and "final" Regulations (on or about July 31, 1983) promulgated by the Department of Finance and Administration and the Commissioner of Revenues of the State of Arkansas, implementing the various provisions of Act 685 of 1983. The two sets of "emergency" and "final" Regulations interpreting Act 685 of 1983 are different in subtle, but particularly important ways with respect to incidents of taxation. Copies of the "emergency" Regulations, which were the subject of a public comment hearing on May 26, 1983, are attached to the original Complaint as Exhibits B and C, respectively. The "final" Regulations of the Arkansas State Highway and Transportation Department were introduced into evidence in this case as Plaintiffs' Exhibit 5.

COUNT I

21. The non-Arkansas based Plaintiffs, on behalf of themselves and all other similarly situated taxpayers, contend, and in this action seek to prove, that Act 685 of 1983 and the "emergency" and "final" Rules and Regulations promulgated to implement the same do, both facially and actually:

(a) burden interstate commerce in violation of the Commerce Clause of the U.S. Constitution, Article 1, Section 8, because;

1. the activities of the Plaintiffs and the similarly situated class of taxpayers in the State of Arkansas do not have a sufficient nexus with the State to subject all of the vehicles operated by such taxpayers that are qualified in other states to carry between 71,281 and 80,000 pounds to the levy provided by Act 685 of 1983;

2. the levy imposed by Act 685 of 1983 discriminates against interstate commerce, favoring local commerce;

3. the burden of levy imposed by Act 685 of 1983 upon non-Arkansas based interstate motor carriers is not reasonably related to the extent of such carriers' contact with the State of Arkansas; and

4. the actual effect of the levy imposed by Act 685 of 1983 will result in the creation of a preferential trade area for local commerce, which will result in the multiplication of such trade areas in other states, which will result in the destruction of free commerce anticipated by the Constitution.

(b) deprive motor carriers operating non-Arkansas based motor carrier vehicles of rights and subjects them to obligations not shared by motor carriers operating motor carrier vehicles based in Arkansas, in violation of the privileges and immunities clause of the U.S. Constitution Article IV, Section 2.

(c) cause Act 685 of 1983 to be incompatible with and contrary to Federal Law and Regulations on a subject matter in which the Federal standards pre-empt and preclude inconsistent state requirements in violation of the supremacy clause of the Constitution, Article VI, Section 2.

(d) deprive motor carriers operating non-Arkansas based motor carrier vehicles of the equal protection of the laws in violation of the 14th Amendment to the U.S. Constitution, and of rights, privileges or immunities secured by the Constitution and laws of the United States in violation of 42 U.S.C. § 1983, since Act 685 of 1983, on its face, discriminates in favor of vehicles registered to carry less than 73,280 pounds and in favor of vehicles registered in Arkansas to carry unfinished and unprocessed farm products, forest products, clays, minerals and ores.

(e) constitutes a tax upon a single class of subjects within the territorial limits of the State of Arkansas,

which tax is not uniform in its impact upon motor carriers operating non-Arkansas based motor carrier vehicles and motor carriers operating motor carrier vehicles registered in Arkansas, in violation of the Uniformity provision of the Arkansas Constitution in Article 16, Section 5.

(f) represents a breach of the State of Arkansas' contractual obligations under the International Registration Plan for motor carrier vehicles, which Plan this State has previously entered into as a signatory party pursuant to the previous authorization of the General Assembly, and, thus, the prohibition on reciprocity of the levy imposed by this Act set forth in section 2(j) of Act 685 of 1983 represents an intentional breach by the State of Arkansas of its contractual obligations with its sister states which must be collaterally estopped.

(g) illegally delegates to agencies of this State powers of taxation without sufficient guidance, so that permanent regulations of both the Director and the Commissioner represent legislative acts.

COUNT II

22. The Arkansas based Plaintiffs, on behalf of themselves and all similarly situated taxpayers, contend, and in this action seek to prove:

(a) that their ability to engage in interstate commerce is unconstitutionally burdened by the prohibition against reciprocity provided by section 2(j) of Act 685 of 1983, in that such prohibition has subjected them to an additional tax in other states mirroring the levy imposed by Act 685 of 1983, which mirrored levy would not be imposed except for the provision of section 2(j) of Act 685 of 1983.

(b) That Act 685 of 1983 represents a breach of the State of Arkansas' contractual obligations under the International Registration Plan for motor carrier vehicles, which Plan this State has previously entered into as a signatory party pursuant to the previous authorization of the General Assembly, and, thus, the prohibition on reciprocity of the levy imposed by this Act set forth in section 2(j) of Act 685 of 1983 represents an intentional breach by the State of Arkansas of its contractual obligations with its sister states which must be collaterally estopped.

COUNT III

23. Plaintiffs also state that the emergency regulations promulgated by both the Arkansas Highway and Transportation Department and the Department of Finance and Administration are violative, both substantively and procedurally, of the Arkansas Administrative Procedures Act and are therefore of no force and effect as regards Plaintiffs herein.

COUNT IV

24. Plaintiffs further state that Defendants have collected, are presently collecting, and will continue to collect, Highway Use Equalization Tax monies under the provisions of Act 685 of 1983. Until a judgment becomes final in this proceeding, Plaintiffs contend that the Defendants should be preliminarily and permanently enjoined, pursuant to Rule 65 of the Arkansas Rules of Civil Procedure, from actually depositing any of these monies in the State Treasury or expending any of the Highway Use Equalization Tax monies illegally exacted under said Act 685 of 1983. All funds collected, pursuant to Act 685 of 1983 pending the outcome of this proceeding, should be held by the State Treasurer or the disbursing agents of the State (or by a third party so designated by this Court) in a special interest bearing account or accounts designated as Highway Use Equalization Tax Collections Fund. Defendants should also be enjoined from appropriating and expending any of said

funds until the judgment entered in this matter becomes final.

25. Plaintiffs contend that Defendants should be preliminarily and permanently enjoined, pursuant to Rule 65 of the Arkansas Rules of Civil Procedure, from imposing penalties and fines for the failure of members of the class from having all indicia of compliance on or with all their intercity motor vehicles, until a judgment becomes final in this proceeding. Alternatively, if such fines and penalties are imposed and collected by the Defendants, the Defendants should be enjoined from depositing these monies in the State Treasury, but should be ordered to deposit such monies to a separate (or escrow) fund, similar to the fund requested in paragraph 20, above, designated as to whom the monies were collected from so that they may be held subject to refund to the member of the class so paying these fines or penalties at such time as the judgment in this proceeding becomes final.

26. Plaintiffs' counsel should be apportioned and awarded a reasonable part of the Highway Use Equalization Tax Collection Fund held subject to refund for professional services rendered to the Plaintiffs and other members of the similarly situated class herein pursuant to the provisions of Ark. Stat. Ann. § 84-4601 and 42 U.S.C. § 1988, or as private attorneys general.

WHEREFORE, Plaintiffs pray that the Court herein enter orders and judgment finding as follows:

(1) That the Defendants be temporarily restrained from depositing funds collected pursuant to the provisions of Act 685 of 1983 into the General Treasury of the State of Arkansas, including all tax monies and any penalties or fines imposed by the Defendants, and to enjoin the Defendants from appropriating and expending any of said funds until the judgment entered in this matter becomes final.

(2) That the Court set a hearing as soon as practicable to issue a preliminary injunction to the Defendants requiring them to deposit the amounts collected pursuant to Act 685 of 1983 to a specially designated interest bearing account which will be held subject to refund to each member of the class when the judgment in this proceeding becomes final, together with interest.

(3) That the levy imposed by the Act 685 of 1983 is unconstitutional and an illegal exaction held subject to refund to the respective payor members of both classes represented by the Plaintiffs.

(4) That Plaintiffs' counsel be apportioned and awarded a reasonable part of the Highway Use Equalization Tax held subject to refund for professional services rendered to the Plaintiffs and other members of the similarly situated class pursuant to the provisions of Ark. Stat. Ann. §§ 84-4601, 42 U.S.C. § 1988 or as private attorneys general.

(5) For such other and further relief as this Court may deem just and equitable.

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER
1000 Savers Federal Building
Little Rock, AR 72201
(501) 376-3151

By /s/ Pat Moran
PAT MORAN

/s/ Eugene G. Sayre
EUGENE G. SAYRE

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Second Amended Complaint this 2nd day of September, 1983, has been made on Counsel for the Defendants by hand delivering a copy thereof to Mr. Chris Parker, Arkansas Department of Highways and Transportation, 9500 New Benton Highway, Little Rock, Arkansas, Mr. Frederick Campbell, Assistant Attorney General, Justice Building, Little Rock, Arkansas 72201, and Mr. Joseph Morphew, Office of Legal Services, Arkansas Department of Finance & Administration, Room 211 Joel Ledbetter Building, 7th and Wolfe Streets, Little Rock, Arkansas 72201.

/s/ Eugene G. Sayre
EUGENE G. SAYRE

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 83-2360

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS; AND ARKANSAS BUS AND TRUCK ASSOCIATION, INC., AND JONES TRUCK LINES, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS, PLAINTIFFS

vs.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; AND BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, DEFENDANTS

ORDER FOR CERTIFICATION AS CLASS ACTION

[Filed Sept. 20, 1983]

On August 5, 1983, the Court heard arguments on the Motion of the Plaintiffs herein, filed pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil

Procedure, seeking an Order of this Court certifying the above-styled cause as a class action. From the matters stated in Plaintiffs' Motion and the affidavits, exhibits and testimony previously filed herein, the arguments and briefs of counsel for the parties and all other proof now before the Court, the Court hereby makes the following findings of fact:

1. Plaintiffs filed their First Amended Complaint herein on July 8, 1983, and their Second Amended Complaint on September 2, 1983, on behalf of themselves and the two (2) separate classes of all other taxpayers who are similarly situated, pursuant to Article 16, § 13 of the Arkansas Constitution, to test the legality and constitutionality of the Highway Use Equalization Tax imposed by the provisions of Act 685 of 1983 as an "illegal exaction."

2. Questions of fact and law raised by the pleadings herein are questions common to all members of either of the defined classes and predominate over any questions which may affect only individual members of either class, thus making a class action superior to other available methods for the fair and efficient adjudication of the issues in controversy herein.

3. Certifying the above-styled cause as a class action will provide a fair and efficient method for adjudication of the controversy herein in that it will enable the interpretation, validity and enforcement of Act 685 of 1983 to be determined in a single forum in which all parties with an interest in the subject matter will have an opportunity to be heard and will spare the Defendants, in tneir official capacities, from the possibility of having to defend in a multiplicity of lawsuits on the same issue.

4. Since an "illegal exaction" suit, brought pursuant to Article 16, § 13 of the Arkansas Constitution is by its very nature a "class action," the Court feels compelled to certify this action as a class action under Rule 23 of the Arkansas Rules of Civil Procedure only because the Supreme Court stated in *City of Little Rock v. Cash*, 277 Ark. 494, 510-511 (1982) that it is error for a trial court under such circumstances, not to require the Plaintiffs to comply with the provisions of Rule 23.

5. The taxpayers subject to the provisons of Act 685 of 1983 form two (2) classes so large that it is impractical to bring them all before the Court within a reasonable time and, as such, the named Plaintiffs herein are able to sue for the benefit of all members of their respective classes, which classes are hereby defined as follows:

1. All motor carriers whose motor carrier vehicles are:

(a) base registered in jurisdictions other than Arkansas; and

(b) subject to the Highway Use Equalization Tax embodied in Act 685 of 1983.

2. All motor carriers whose motor carrier vehicles are:

(a) base registered in the State of Arkansas; and

(b) subject to the Highway Use Equalization Tax embodied in Act 685 of 1983.

6. The parties hereto are specifically exempt from any requirement of giving notice in this matter, since it is an "illegal exaction" suit.

IT IS, THEREFORE, CONSIDERED, ORDERED AND DECREED by the Court that the Motion of Plaintiffs filed herein requesting certification of this action as a class action should be, and, accordingly is hereby, granted

and the above-styled cause is hereby certified as a class action pursuant to Rule 23 of the Arkansas Rules of Civil Procedure.

ENTERED this 20 day of September, 1983.

/s/ Bruce T. Bullion
BRUCE T. BULLION
Chancery Judge

APPROVED AS TO FORM:

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By /s/ Eugene G. Sayre
EUGENE G. SAYRE

Solicitors for Plaintiffs

DEPT. OF FINANCE AND
ADMINISTRATION
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P.O. Box 1272-L
Little Rock, Arkansas 72203

By /s/ Michael D. Munns
MICHAEL D. MUNNS

OFFICE OF THE ATTORNEY GENERAL
Assistant Attorney General
State of Arkansas
Justice Building
Little Rock, Arkansas 72201

By /s/ Frederick K. Campbell
FREDERICK K. CAMPBELL

ARKANSAS STATE HIGHWAY COMMISSION,
Henry C. Gray and Roy L. Johnson
P.O. Box 2261
Little Rock, Arkansas 72203

By /s/ Ted Goodloe
TED GOODLOE

Solicitors for Defendants

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

No. 83-2360

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS; AND ARKANSAS BUS AND TRUCK ASSOCIATION, INC., AND JONES TRUCK LINES, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS, APPELLANTS

vs.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; AND BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, APPELLEES

ORDER

[Filed Oct. 11, 1984]

Now on this day comes on to be heard the above styled case with plaintiffs appearing by their attorney, Eugene Sayre, Defendant Jimmie Lou Fisher, Treasurer of State

of Arkansas appearing by her attorney, Frederick Campbell, State Revenue Defendants appearing by their attorney Joe Morphew, and State Highway Defendants appearing by their attorneys, Thomas B. Keys, Chris Parker, and Ted Goodloe. From the testimony of the witnesses, exhibits and arguments of counsel, the court makes the following findings:

FINDINGS OF FACT

1. Act 685 of 1983 applies to trucks whose declared gross weight is between 73,281 pounds and 80,000 pounds.

2. Basically, Act 685 of 1983 requires those trucks to pay 5 cents per mile for miles operated in Arkansas, with the option to pay an annual $175 fee.

3. The annual fee of $175.00 presumes that those trucks operating in excess of 3500 miles will pay less than 5 cents per mile.

4. A tax which is fixed in amount (flat fee tax) for a period of time (such as one year) presumes that the tax impacts differently depending upon the use made of the privilege taxed.

5. Many taxes are based on an annual amount and the privilege bestowed is without restriction on its use.

6. A flat rate tax which is considered on a mileage basis falls with an unequal burden because those who travel more miles will pay a different per-mile-cost than those who travel less miles.

7. The Arkansas Legislature is not hampered by an inability to draft a flat rate tax which is going to fall with an unequal burden on a cost-per-mile basis.

8. No other findings of facts are required for a decision of this case.

CONCLUSIONS OF LAW

9. The constitutional arguments of plaintiffs' lawsuit are primarily based on the Commerce Clause of the U.S. Constitution.

10. Act 685 of 1983 does not violate the Commerce Clause of the U.S. Constitution.

IT IS THEREFORE ORDERED that the complaint of Plaintiffs is dismissed.

/s/ Bruce T. Bullion
Chancellor

10-11-84
Date

APPROVED:

/s/ Frederick K. Campbell
Attorney for Defendant
Jimmie Lou Fisher, Treasurer
FREDERICK K. CAMPBELL

/s/ Joe Morphew
Attorney for State Revenue Defendants
JOE MORPHEW

/s/ Thomas B. Keys
Attorney for State Highway Defendants
THOMAS B. KEYS

[TESTIMONY OF MR. MOHNEY]

[256] *Frank Mohney*, having been called by and on behalf of the Plaintiffs, testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q State your name, please, sir?
A Frank Mohney, M-O-H-N-E-Y.
Q What is your address, please, sir?
A Route 2, Box 184G, Lowell, Arkansas.
Q What is your profession or employment, please?
A Employed by Jones Truck Line, Vice President of Marketing.
Q Do you have any office or relation with regard to the Arkansas Bus and Truck Association?
A Yes, sir, I'm President of the Arkansas Bus and Truck Association.

• • • •

[257] BY MR. SAYRE:

Q Has Jones Truck Lines, as an Arkansas based interstate carrier, complied with the provisions of Act 685 and paid the Arkansas Highway Use Equalization Tax?
A Yes, sir.
[258] Q When did you make that payment?
A Well, we made that payment when we filed our IRP application. I believe it was the last of June.
Q How much in Arkansas Highway Use Equalization Tax was paid by Jones Truck Lines?
A Sixty Three Thousand Three Hundred Fifty Dollars ($63,353).
Q How many of your three hundred and sixty two (362) trucks did the company qualify under the Act 685?
A All of them.

Q All three hundred sixty two (362)?
A All three hundred sixty two (362).
Q Does the company have other vehicles that it owns?
A Yes, sir.
Q What are those type?
A Well, we have city pickup and delivery equipment stationed in each one of the seventy two (72) terminals and they are normally licensed within that state.
Q And they will not . . .
A They do not perform an over the road operation.
Q And they will not carry more than this seventy three thousand two hundred eighty (73,280) pounds?
A No, sir.
Q How many Arkansas miles or how many miles did the [259] Jones Truck Line operate over the highways of the State of Arkansas in the last year? The one that you had to measure to qualify for the Highway Use Equalization Tax?
A Six million nine hundred twenty one thousand four hundred sixty five (6,921,465).
Q And of your total miles in all seventeen (17) states, what's that percentage?
A That represents twenty three percent (23%) of our total miles in Arkansas.
Q Does Jones Truck Lines operate in the State of Oklahoma?
A Yes.

• • • •

[261] BY MR. SAYRE:

Q Mr. Mohney, I will repeat the question. What type of taxes does Jones Truck Line pay to the State of Oklahoma generally?
A Well, we normally pay what taxes are assessed by them on our units as well as the taxes that we pay on property in Oklahoma or any equipment that is based there.

Q All right. Since July 1 of this year, has Jones Truck Lines been assessed any additional taxes?
A Yes, sir. We have been assessed a Hundred Seventy Five Dollars ($175) per unit that has—that is going through Oklahoma.
Q And what was the reason stated for such imposition of a tax?
[262] A That this was a mirror tax against the State of Arkansas.
Q Mr. Mohney, I'll hand you what's been marked Plaintiff's Exhibit One (1) and ask you if you can identify that, please, sir?
A Yes, sir. These are copies of tickets that our units have received in Oklahoma since July 1 for the annual mileage use tax.

• • • •

CROSS EXAMINATION

BY MR. PARKER:

[273] Q How does—how does Jones Truck Lines decide what it's ging to charge for hauling? Are y'all an ICC regulated carrier?
A Yes, sir.
Q So, then, you publish tariffs periodically, is that correct? And unless those tariffs are objected to by the ICC, they become your rate for your hauling and such?
A They are filed in the various rate bureaus, Rocket Nine and Federal West, et cetera.
Q Does Jones file individual or do they file as a group with other carriers in these regional rate bureaus?
A Well, we file both ways. We file as the bureau rates and we also have our own individual tariff.
Q How are those tariffs arrived at? Is there something like a rate base and a PSC case that you show what their expenses are in making that haul and then you receive a certain level of profit over that? How are

those arrived at and what form [274] are they reviewed by the ICC?

A Rates are primarily based on the cube that they will occupy in the trailer and anytime that you get a rate increase you have to justify the reason for that. Whether it be fuel increase, labor increase or whatever it is.

Q So, in the normal course of events, if there's an increase tax on a carrier, that will reflect itself in a revised published tariff as an increase in doing business?

A As an increase in doing business and passed on, ultimately, the consumer or general public.

Q Has Jones taken any steps in passing on the Oklahoma Merit tax on those routes to the consumers? Are you treating it as a permanent tax?

A No, sir.

Q When will that be done? Does Jones have any plans to pass that on?

A Yes, as soon as we find out if the Arkansas tax is permanent because that tax will be passed on to the Arkansas consumer as well.

Q You all do not, then, have a periodic republication of tariffs as simply the business judgment? If expenses require a new tariff you publish it, it's not something that's an annual or twice a year?

[275] A No, it's on need.

* * * *

[TESTIMONY OF MR. CORBUTT]

[286] John Corbutt, having been called by and on behalf of the Plaintiffs, testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q State your name and address, please, sir?

A John W. Corbutt, 2001 Gum Potter Road, Little Rock, Arkansas.

Q What is your business address, please?

A 1122 West Capitol Avenue.

Q At the present time, by whom are you employed?

A I'm the Executive Vice President of the Arkansas Bus and Truck Association.

* * * *

BY MR. SAYRE:

[288] Q Did the Bus and Truck Association seek in this last legislative session to implement the size and weight provisions of the Service Transportations and Systems Act?

A Yes, we did.

Q Tell the Court what the Service Transportation and Systems Act is?

A It was a federal law passed known to the public as the five cent (5¢) fuel tax but also was in apposition of a highway use or tax on the trucking industry to raise money for highway funding which was passed by the Congress.

Q When was it passed, please, sir?

A I believe the effective date was January 6, 1983.

Q All right. That's this year?

A Yes, sir.

* * * *

[289] BY MR. SAYRE:

Q What was the size specifications or standardizations contained in that Act regarding to trucks?

A As I earlier said, they set a standard—a federal standard on highway sizes relative to vehicle sizes and forty eight (48) foot assembly trailers and twenty eight (28) foot trailers, eighty thousand (80,000) pound weights and a hundred and two (102) inch width.

Q And did that apply to across?

A Nationwide.

Q Nationwide. At that time there were three (3) states [290] that had not yet enacted a maximum weight of eighty thousand (80,000) pounds, is that correct?

A Yes.

Q And Arkansas was one of those?

A Illinois and Missouri, yes, sir.

• • • •

[TESTIMONY OF MR. VENABLE]

[472] *Charles Venable*, having been called by and on behalf of the Defendants, testified as follows:

DIRECT EXAMINATION

BY MR. PARKER:

Q State your name and address for the record.

A Charles A. Venable, 3110 Rodney Parham Road, Little Rock.

Q Where do you work, Mr. Venable?

A The Arkansas Highway and Transportation Department.

• • • •

BY MR. PARKER:

[474] Q I want to discuss with you what the effect's going to be if the Court continues to freeze the Highway Use Equalization funds after August 1. First, could you discuss what areas there are in the Department budget that simply can't be used to take up that slack?

A Of course, we have ongoing contract at this time that have to be paid off and, I believe, we still owe some Hundred Thirty Five Million Dollars ($135,000,000) on these contracts. We, also, have certain fixed costs such as salaries, overhead, certain expenses, thing of this nature that we could not eliminate.

Q When you talk about the contracts that are coming due, how are those things paid? Would you go into that a little bit?

[475] A Well, they are paid as the [work] progresses. The contractor submits an estimate and he's paid by estimate on the amount of work he has done.

Q Where will the freezing of the amounts we're talking about, Ten ($10,000,00) or Eleven Million Dollars ($11,000,000), have to be accomodated in the Department's budget?

A Well, at the present time looking down-range, the first place you would look in being—will be in the area of letting additional contracts.

Q Who makes the ultimate decision as to when contracts are let?

A Well, the Arkansas Highway Commission is the one that has the final decision as to when the contracts will be let.

Q So, what you're testifying to is basically what the staff's recommendations would be to the Commission?

A Yes.

Q Would it be possible to let contracts, full state contracts, with that Ten ($10,000,000) or Eleven Million Dollars ($11,000,000) of tax money?

A Yes, it would be.

Q Can you discuss some reasons why that might be desirable after August 1?

[476] A Well, of course, we have not been able—our financial situation has not allowed us to go in and do any work other than with matching federal aid for contracting in the past few years. There are several miles of road that need to be resurfaced in order to extend the life and certainly with heavier loads now. The reservicing of these would be a big benefit if we were able to do this by taking this money and using it for reservicing at this time.

Q You say that would extend pavement life that is currently wearing out because of the heavier loads?

A Yes. A lot of our miles are what we classify as in fair condition and by simply overlaying, we could extend the life of these some eight (8) to ten (10) years.

Q If the Commission made the decision that they wanted to use this Ten ($10,000,000) or Eleven Million Dollars ($11,000,000) from that special money—well, I'll come back to that. Will we receive any additional federal money for the 1983?

A Well, there's a possibility that some funds, and this is not additional funds, but simply funds that [477] —maybe I need to explain a little bit about what options we have. First of all, our monies—the federal dollars that have been received will be apportioned and will be obligated by the end of this month. There is a possibility of receiving additional obligation authority. During the past of 1980, the federal government has placed a limitation on the amount of federal funds that can't be obligated. As a result, we have had impounded—right now we have about Forty Million Dollars ($40,000,000) impounded that we have not been able to obligate and there is a possibility that some of the other states would not be able to obligate all off their '83 money and some of this would be available for us and there is a possibility that we could pick back up some of the money that is now impounded.

Q When will be know about that?

A I think it will probably be about the middle of August before we actually find out. The final report has to be to the Federal Highway Administration, I believe, on August 8.

Q Have we ever received funds or obligations—obligation money from this source in the past [478] and, if so, by how has this money amounted to?

A Yes, in 1981—fiscal year 1981, the same thing occurred and we were able to take advantage of this to the tune of about Thirty Two ($32,000,000) or Thirty

Three Million Dollars ($33,000,000), I don't remember the exact figure.

Q How much obligation money are we asking for? Have we made a request?

A Well, we will in our report which will go out probably tomorrow. It's due in the Little Rock office by August 3. We'll list some Thirty Seven and a Half Million Dollars ($37,500,000) of federal aid that we could possibly pick up.

Q How's that calculated? Is that based on specific jobs that we would like to be able to let?

A Yes, by job and by categories of funding to which you have the money available. Because the money is apportioned by counties.

Q If that redivision of money becomes available and if the Ten ($10,000,000) or Eleven Million ($11,000,000) of the Highway Use Equalization funds are unfrozen and a decision is in the position to use that match, will we be able to be in a position to contract on those funds?

A Yes.

• • • •

BY MR. PARKER:

[481] Q What are the matching ratios for the kind of jobs we would like to be able to use this money for?

A Well, it varies depending on the category of funds from, say, the interstate with ninty percent (90%) federal, ten percent (10%) state, bridge replacement eighty percent (80%) federal funds and twenty [482] percent (20%) state and the other are generally seventy five percent (75%) federal and twenty five percent (25%) state and on the average . . .

Q Based on the jobs that we know, we would have to go to contract with?

A Generally, that's an overall average, yes.

Q At that rate, what is the total amount of contracts we would be able to let using the Ten ($10,000,000) or

Eleven Million ($11,000,000) of the Highway Use Equalization Tax?

A Well, you could spend the Ten Million Dollars ($10,000,000) on a forty one (41) match. You can go to contract, say, for Fifty Million Dollars ($50,000,000).

• • • •

[504] THE COURT: Can you give me a guess? If I understand correctly—let me tell you what I'm trying to get at, Mr. Venable. If I understand correctly, this tax was passed on these trucks at an attempt to offset the extra damage that was going to be done to the road because of the extra weight?

THE WITNESS: That's true.

THE COURT: All right. What have y'all estimated was going to be that extra damage?

[505] THE WITNESS: We estimated, as I said earlier, at Thirty Two Million Dollars ($32,000,000) and if you bring that up to 1983 value it would be somewhere around Fifty Three Million Dollars ($53,000,000).

• • • •

[TESTIMONY OF MR. NICHOLS]

[516] *Brooks Nichols*, having been called by and on behalf of the Defendants, testified as follows:

DIRECT EXAMINATION

BY MR. GOODLOE:

Q State your name and address, please, sir.

A I'm Brooks Nichols and I live at 17008 Quail Run in Little Rock.

Q And what is your occupation?

A I'm the Assistant Chief Engineer for design for the Arkansas Highway and Transportation Department.

• • • •

[534] BY MR. GOODLOE:

Q What is the effect, Mr. Nichols, of using twenty (20,000) KIP axle loads? You said what percent increase or what amount of increase is this? I may not be saying that right but what is the effect of twenty (20,000) KIP axle load, a twenty thousand (20,000) pound axle load?

A It has the effect—it has the effect of increasing the relationship—well, of increasing the number of eighteen (18,000) KIP loads on the highway. When you just compare those two (2) axles between fifty one (51) ad fifty eight percent (58%).

Q It increases what between fifty one (51) and fifty eight percent (58%)?

A It increases the loading.

Q It increases the loading?

A Yes.

Q Now, what does that do as far as damage is concerned? How would you relate that to the damage to the highways?

A Well, as we said, those are two (2) of the principle ingredients, your soil and your traffic. So, that's [535] one of your factors and as you increase loading then you ultimately must have additional thickness. So, it increases the amount of pavement that you need to preserve the highway need.

Q So, we actually need a little thicker highway if we're going to have increased axle loads?

A That's right.

Q Did we design for twenty (20,000) KIP axle loads on Arkansas interstate highways?

A No, sir, we designed for the weight that we had at the legal maximum of the time which was seventy three two eighty (73,280).

Q What will be the effect, in your opinion, of going to twenty (20,000) KIP axle loads and a road vehicle

weight of eighty thousand (80,000) pounds on Arkansas highways?

A We analyze our interstate system over its expected life of twenty (20) years and increasing the loading from seventy three two eighty (73,280) to eighty thousand (80,000) pounds indicated to us that we would have a life loss. In other words, the pavement would not last as long. We would lose about ten percent (10%) of the life of our interstate pavements.

Q What do you mean by ten percent (10%) of the life? [536] You're going to have a gravel road out there?

A No, it will reach a point where it has to have some major additional rehabilitation to it. Not—you know, you're not going to let the interstate system go back to gravel. What we're talking about is that it will come down to a point that it is uncomfortable and at that point in time we consider it as reached its designed life.

Q And what kind of work have you been doing? What do you contemplate as the type of reconstruction, new construction or whatever you want to call it, what type?

A Well, there are different ways of doing it. One you can use a lot more funds in maintenance and try to keep it, you can go in and strengthen your pavement by putting additional thickness out there which is . . .

Q Is that called overlay?

A Yeah. It is an overlay. It can be made out of either rigid or flexible pavement. Normally, overlays are considered to be flexible but it doesn't have to be. It could be either one or the other. For instance, let me just tell you, if we had all the unlimited—just had money all we needed right now and we could go out there and take all [537] of our pavement system and put in an adequate amount of overlay to take care of the loads, then, they would last as long as we had expected them to last. But money is not there to do this. So, what you

do, you've got to start using it as you can or they're going to suffer early death.

Q Now, what are the effects of increased axle load on the interstate highways again?

A Our studies show that it would be a loss of pavement life of about ten percent (10%).

Q And what about the primary highways?

A The indication of the life and studies that we have done and you have to remember that we have a lot of primaries that aren't designed to the point that they should be even if you carry this seventy three two eighty (73,280) for the increase in weight, it just worsens and hastens the condition. It looks like to us that we're loosing about twenty five (25) to thirty percent (30%) life at our primary system as a total.

• • • •

CROSS EXAMINATION

[549] BY MR. MORAN:

Q Mr. Nichols, I believe you indicated on your direct that when you increase from an eighteen thousand (18,000) pound axle load to a twenty thousand (20,000) pound axle load that you ultimately need more thickness in your pavement?

A Yes, sir.

Q You're not necessarily indicating that you need any additional thickness immediately upon increasing [550] the load but you're ultimately going to need more thickness on that road over a course of time, is that right?

A Well, that isn't quite true. You need it immediately. If you want your pavement to last through a reasonable design life, you need an adequate pavement structure for the load that's going to be imposed on it. The facts of the matter is that's an impossibility. We have over sixteen thousand (16,000) miles of state highway system in our system. So, it's impossible to imme-

diately strengthen all of it, you know, and to take on a given day and time to take it. So, what you have to do is to utilize your funds the best that you can to strengthen them as you can accumulate funds. In the meantime, realizing that the pavements are continuing to get in worse condition during this period of time.

Q Would you be able to detect any of the deterioration difference over, say, a nine (9) month period if you were unable to increase the thickness? Say, over an eight (8) or nine (9) month period would you even be able to see that with the eye?

A Mr. Moran, it would depend on how badly the system was under design.

[551] Q I'm talking about on the ones that were designed properly, of course.

A The one that was designed for what?

Q Well, the ones that make the ASHTO test are the ones you indicated you designed?

A Well, I have designed some that have failed, sir. If you're asking about on an interstate highway system, could you in nine (9) months detect additional damage to the highway over and above what you would have had had the eighteen thousand (18,000) pound load stayed in effect, it would take a pretty critical determination over a nine (9) month period to detect the difference. It's going to—it's going to deteriorate. Everything deteriorates and the fact is that it would be deteriorating at a somewhat more rapid rate. But if you're in the early stages of it, it would be almost impossible to detect if it were new pavement. If you were at the very later stages of it I think it would be much easier to detect that increase in the weight. Because your life expectancy curve will steepen as it gets toward the terminal life of it and, so, damage is much more easy to detect.

Q The fact remains that the two (2) year loss of [552] service life, I believe you referred to it as, is

going to occur over a period of time. That loss builds up over a period of time, is that correct?

A It starts immediately and ends up over a shorter period. It just doesn't last as long. Is that what you mean, sir? If it's—if it were a very badly undesigned pavement, then, it would show up almost immediately. And we've got some real badly undesigned pavements in the State of Arkansas.

• • • •

[TESTIMONY OF MR. JOHNSON]

[554] *Ralph Johnson*, having been called by and on [555] behalf of the Plaintiffs, testified as follows:

DIRECT EXAMINATION

BY MR. MORAN:

Q Please, state your name and address?

A My name is Ralph Johnson and my address is 5101 Whiteflint Drive, Kensington, Maryland.

Q What is your profession?

A I am a Transportation and Management consultant.

Q What is the name of your consulting firm?

A The name of our consulting firm is Counsel Transit Incorporated.

• • • •

BY MR. MORAN:

[564] Q Okay. You also heard or did you also hear Mr. Nichols testify with regard to what he considered to be a ten percent (10%) loss of service life which he expressed another way. I think he expressed it in another way of saying that a road built for twenty (20) years of use might wear out in eighteen (18) years. Did you hear [565] him [a]llude to that in his testimony?

A He made that estimate for the interstate system and that is, you know, the common way of referring to this. That's what the loss of service life would mean because there is a twenty (20) year design period to

begin with and you would expect to have the road—the highway wear out in two (2) years earlier than that spread over that particular period. We did a study here a couple of years ago for, basically, a group of truckers to represent for the eighty thousand (80,000) pound loading at that particular time and we did a very scientific and technical study. We could not see any comparable technical analysis that the State had performed up to that particular time. I don't know what they have done since but up to that particular time we did, I think, a very thorough scientific job and we came up a seven (7). We took, basically, a twenty percent (20%) random sample of the pavements on the interstate system and to the actual designs by getting the design information from the Highway Department and determined basically the increase in cost that would be required in design or was required—not required in design, required at this current time to [566] upgrade those facilities—well, first of all, to upgrade them to the current—to take care of future axle loadings. At that time the current axle loading was seventy three two eighty (73,280) and, then, as an alternative to upgrade them to take care of eighty thousand (80,000) pound loadings and work out the cost differences between the two (2). And on this basis, we came up with a seven percent (7%) increase or about a one point three five (1.35), your actual reduction in service life on the interstate system as a result.

Q So, you differ with Mr. Nichols?

A Our findings at that particular time differ from Mr. Nichols findings of ten percent (10%), yes.

* * * *

BY MR. MORAN:

[571] Q Mr. Johnson, you heard the testimony, also, of Mr. Charles Venable—or let me ask you. Did you hear the testimony of Mr. Charles Venable?

A Yes, sir.

Q And I believe that he made a reference in answer to a question from the Court or gave an estimate of some

Thirty Million Dollars ($30,000,000) in damages. I hand you a document marked Plaintiff's Exhibit Thirteen (13), I believe. It is entitled Cost and Savings Associated With Changes in Weight Limits on Arkansas' Highways. It bears an October 1982 date. Did you prepare or have a hand in preparing that particular report?

A Yes. I directed the performance of this analysis.

Q It's prepared by your consulting firm, Counsel-Trans Incorporated?

A That's correct.

* * * *

BY MR. MORAN:

[588] Q In your 1982 study, I want to ask you, Mr. Johnson, at the current funding level at the Arkansas Highway Department, what would be the extra cost for the Arkansas roads to increase from seventy three thousand two hundred eighty (73,280) pounds up to eighty thousand (80,000)? In other words, what does your seven percent (7%) on the chart that you've drawn translate into in dollars to lay the thicknesses you've talked about?

A At the current program cost, Eight Million Dollars ($8,000,000).

* * * *

CROSS EXAMINATION

[662] BY MR. KEYS:

Q He either can or can't?

A I have said that at the optimal program level we found Twenty Six Million Dollars ($26,000,000), at the optimal level. The difference between that and the total damage, I don't know. I don't think that there is anywhere near that spread between that figure of Twenty Six ($26,000,000) and Fifty Three ($53,000,000) but that's all I can say.

Q All right. I'm going to ask you one more time. [663] Is the Twenty Six point One ($26.1) Million actual damages or is that something else?

A That's damages at an optimal program level that presumably took into consideration at that particular time all of the needs on the interstate system.

Q Well, then, it has no relationship to the Fifty Three Million ($53,000,000) that Mr. Venable testified to?

A The—I guess I have to put it on a judgemental basis. In my judgement, that Twenty Six Million ($26,000,000) does not warrant as high a figure as Mr. Venable's or is reporting here. But I have to say that's entirely in my judgment.

Q Well, in your judgement, how high a figure does it warrant?

A I couldn't give you any figure. I just said that that's too much of a spread and I'm not prepared to say what the spread should be.

Q How about Forty Four Million ($44,000,000)?

A I'm unprepared to say between here and there what it would be.

Q Mr. Johnson, you know what this lawsuit is about, don't you?

• • • •

[TESTIMONY OF MS. HAYDEN]

[1937] *Vickie Hayaen*, having been called by and on behalf of the Plaintiffs, testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q Ms. Hayden, would you state your full name and address for the record, please?

A Vickie Hayden, 7802 Bonnie Brae, Little Rock, Arkansas.

Q What is your profession or employment?

A I'm a motor fuel tax auditor for the Arkansas Highway and Transportation Department.

Q And under those, that general job description, [1938] what are your responsibilities?

A I audit gasoline distributors, diesel suppliers and fuel users and any other research in the motor fuel area requested by my supervisor.

Q Do you know Mr. Gip Robertson?

A Yes, sir.

Q And did Mr. Robertson assign you a task in the last month with regard to a survey prepared by the American Trucking Association, or summary result of a survey?

A Yes, he did.

• • • •

BY MR. SAYRE:

[1939] Q What was your assignment in that regard?

A All right. Well, another auditor in our office and I were called into Mr. Robertson's office and he discussed with us that he would like for us to look at the two surveys presented by the ATA. The two auditors, Sharon Byrd and myself, determined between us which one would review the foreign based survey and which one would review the Arkansas based survey.

Q Which one did you review?

A I reviewed the Arkansas based survey.

Q What procedure did you follow on the Arkansas based survey review?

A The first we did was to review the companies listed in the ATA survey to see if those companies were licensed under the IRP. We then scheduled out those companies that did have accounts with IRP. We pulled those folders and scheduled out the costs of the HUE tax paid to IRP and the Arkansas mileage reported. And we compared those costs and mileage with the costs and mileage reported on the Arkansas based ATA survey.

Q Do you have any work papers showing the results [1940] of your work?

A Yes, I do.

Q Would you present that to us concerning that verification?

A Yes, sir.

Q I hand you what's been marked Plaintiffs' Exhibit Number 38 and ask if you can identify that, please, ma'am?

A Yes. This is the revised ATA survey information for the Arkansas based companies.

Q And is that your handwriting?

A Yes, it is.

Q What does that five page document reflect?

A Of the companies listed on the ATA survey we could only verify 79.75 percent. There were some of the companies, thirty-six of them, which were in a work and process file in the IRP and we were not able to review those companies. Of the 79 percent that we were able to review we found various discrepancies between the costs and mileage reported to IRP and the costs and mileage on the survey. And, therefore, we feel like. . . .

Q Excuse me. I asked what you found. You found discrepancies?

[1941] A We did find discrepancies, yes, sir.

Q How many discrepancies did you find?

A We found twenty of the Arkansas based carriers out of the hundred and two that we were able to review the files had discrepancies on the costs paid to IRP, that varied from the costs on the survey. Thirty-two. . . .

Q Which ones are those? Are they designated in some manner?

A Yes. There's a black dot by the tax cost.

Q A black dot? Which column is that, please?

A Column seven.

Q Would you give us an example?

A The very first one listed in account number 3744, A & M Enterprises. . . .

Q Where is the black dot?

A On my report it's right to the left of the dollar figure.

Q All right. So all of those, you said, were discrepancies?

A Yes, sir.

Q Those that do not have dots you confirmed?

A Yes, sir.

Q How many did you confirm then?

A There were eighty-two that agreed with the [1942] costs as far as the IRP costs reported and the costs on the survey.

Q Eighty-two out of how many?

A Out of a hundred and two.

Q So you said that basically eighty percent agrees. Is that correct?

A Agreed on the costs. I also broke it out as far as discrepancies on the mileage. Thirty-two out of the hundred and two carriers' mileage reported to IRP varied from the Arkansas mileage on the survey.

Q How many agreed?

A That would be seventy.

Q All right. Did you check the Arkansas mileage based upon the accrued Arkansas and reciprocity miles, or just the Arkansas miles?

A Just the Arkansas miles. Those miles traveled in Arkansas.

• • • •

BY MR. SAYRE:

[1943] Q All right. What else . . . . you said there were thirty-two. How did you designate those?

A All right. There's a black dot to the left of column 8.

Q All right. What else did you do?

A After we scheduled out all of these companies we did make a total of our work sheet. We also came up with an IRP cost per mile and compared that cost per mile to the cost per mile on the ATA survey.

Q And that appears on page 5 at the bottom of the column?

A Yes, sir.

Q And is this average figure, the IRP cost per mile, an average of the averages, or is it a average of the IRP tax costs that you've written and divided by the number of IRP miles?

A It's an average of the average.

Q It's an average of the averages?

A Yes, sir.

Q So, in other words, you found a mean average as opposed to dividing the total numbers?

A Yes, sir.

[1944] Q For the total miles?

A Yes, sir.

Q Why did you do it that way?

A Well, I thought that because we were looking at a per company cost per mile that the cost per mile per company was going to vary because of the number of trucks registered and the number of miles driven. And so it more fairly represented the company's average cost per mile.

Q All right. You were figuring companies' cost, not vehicle cost, is that correct?

A That is correct.

Q So that if a carrier had two hundred trucks and another carrier had two trucks you would compare the companies' cost, not the total of the two hundred two vehicles with an average? Is that correct?

A That is correct.

Q What did your figures show where the—excuse me. Your figures on this Plaintiffs' Exhibit 38 reflect—not the ATA figures, but the figures you extracted from the actual records of the IRP section of the Arkansas Department of Revenue, IRP section?

[1945] A Yes, sir. Columns 6 through 9 represent the IRP. Columns 12 through 14 represent those figures on the ATA survey.

Q What result did you reach on the IRP tax costs using your company averages?

A Using the company average, the IRP cost per mile totalled out to be one cent per mile.

Q Is it rounded up to one cent, or less than one cent?

A No. It was one cent.

Q Even?

A Even. Using the first four digits.

MR. SAYRE: Your Honor, I would offer Plaintiffs' Exhibit Number 38.

THE COURT: Any objections?

MR. GOODLOE: No, Your Honor.

THE COURT: Without objection, 38 will be received.

• • • •

CROSS EXAMINATION

BY MR. GOODLOE:

[1947] Q You were finishing a sentence and Mr. Sayre interrupted you and I believe you were talking about your feelings of the results of the work that you did. Would you finish that, please?

A We just felt that we could not come to any valid conclusion as to a cost per mile because there were so many discrepancies between the figures reported to IRP and the figures on the ATA survey.

Q It looks to me like the figures are, you know, roughly seventy and eighty percent accurate. Is that the way you would do it? You would subtract twenty from a hundred and [1948] two and thirty-two from a hundred and two and in pretty rough terms it would be seventy and eighty percent accurate, is that correct?

A Well, I took the total discrepancies, which were twenty discrepancies on costs and thirty-two discrepancies on mileage, which was a total of fifty-two discrepancies noted which was fifty-one percent discrepancies.

Q So the discrepancies is not seventy or eighty percent?

A Right.

Q It's what?

A It is fifty-one percent.

Q Fifty-one percent of what?

A Of the hundred and two carriers' mileage and cost that we were able to review.

Q The hundred and two carriers represent what percent of the carriers on the ATA survey?

A Represent fifty-nine percent of the carriers that are represented on the survey.

Q So you were saying you could only verify fifty-one percent of the survey that you could only find find fifty-nine percent to begin with. Is that right?

A Yes.

• • • •

[TESTIMONY OF MS. BYRD]

[1957] *Sharon Byrd,* having been called by and on behalf of the Plaintiffs, testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q Would you state your name and address, please? [1958] A Sharon Byrd. My address is 218 North Taylor, Number 11, Little Rock 72205.

Q What is your profession or employment, please?

A I'm a tax auditor for the Arkansas Highway and Transportation Department.

• • • •

[1963] BY MR. SAYRE:

Q Ms. Byrd, we were talking about what you were assigned to do by Mr. Robertson. What was that, [1964] please?

A To take the report by the ATA over to the Revenue Department to compare it with the costs they had presented.

• • • •

BY MR. SAYRE:

[1968] Q Were you given any special assignment with regard to modifying the ATA study?

A One problem we found in looking at the figures. . . .

Q Excuse me. Were you assigned a special task?

A I was assigned to verify the figures presented in the ATA report and to determine if they had an accurate figure and cost per mile figure arrived at.

Q Were you given a special task by Mr. Robertson to modify the ATA study to make it reflect what the Highway Department figures reflected on actual dollars collected?

A In order to determine if ATA had presented a figure that was, that could be verified, we did decide that we needed to bring the quantity represented for the one seventy-five [1969] option carriers up to proportion that was related to that represented by the five cent per mile carriers.

• • • •

[1971] Q No, how did you go about it? You said you modified the ATA study.

A Okay. What I did, I took the one from the Highway Users Tax Unit at the Highway Department for all who were on the one seventy-five option program. I went through those companies and added additional companies that were not used on the ATA survey.

Q You modified the study by adding carriers and vehicles that had not been reported through the ATA

study at the hundred seventy-five dollar option that appeared on the records of the Highway Department?

A Correct.

Q To supplement the ATA study to make the total dollar figures balance with what you said the Highway Department's. . . .

A Actual cash receipts were at that point.

• • • •

BY MR. GOODLOE:

[1973] Q So was that sufficient to bring it into balance?

A No. With all of these . . . . with the number . . . . now, I'm saying that with the use of these . . . . we were not able to obtain the information on all of these that we scheduled.

Q Well, was that sufficient to bring it into balance?

A No, it was not.

Q Did you add any more?

A No, we did not, due to the time factor. This is where I stopped. At this point we had reached a little over half of what we needed.

• • • •

BY MR. SAYRE:

[1974] Q Ms. Byrd, I hand you what's been marked Plaintiffs' Exhibit 39 and ask you what that is, please?

A It is the Extended Arkansas/Foreign Based ATA Taxpayers Highway Use Operating Characteristics Schedules audited by the Highway Department.

Q And is that the worksheet on which you reflected the addition of the carriers that were not in the ATA study to bring it up to the same proportion?

A Yes, it is.

• • • •

BY MR. SAYRE:

[1984] Q Ms. Byrd, the results that you found on the study that you conducted on Plaintiffs' Exhibit Number 39, did you then add those to [1985] the ATA study figures?

A Yes, I did.

Q And come up with a total that is comparable to the totals reflected in your records as of August 23, 25 or whatever you said it was?

A Well, we did add them into the ATA figures.

Q Now where did you add those in?

A I have done this on a scratch sheet.

Q I hand you what's been marked as Plaintiffs' Exhibit Number 40 and ask you if that is a copy of that scratch sheet?

A Yes, it is.

• • • •

[1986] Q I was just asking when you added it. With regard to Plaintiffs' Exhibit 40, would you explain what you did to supplement the ATA study with the hundred seventy-five dollar figures you found on Plaintiffs' Exhibit 39?

A Yes. I just took. . . . I copied down the figures they had for the five cent per mile option carrier. I also carried down the information they had presented for the one seventy-five annual option carriers, added to the one seventy-five option figures the figures we obtained in our sample to come up with a revised total and came up with the revised estimate as to cost per mile.

Q In other words, you were attempting here to modify the ATA studies to bring it into a proportion with what you said the actual universe, or the actual records, of the Highway Department showed by adding the hundred seventy-five dollar method or option carriers to that total. Is that correct?

A Correct.

Q You didn't modify the five cents people at all, [1987] is that correct?

A Well, any modification if you're still working with mileage and cost figures you're still going to come out with five cents per mile. So what we were trying to do is bring this half of the average up proportionately.

Q What I'm saying is, you didn't lower the five cents?

A No.

Q You left that as standard and brought the hundred and seventy-five dollars up to the standard?

A Yes.

Q Okay. And when you added those together what are the totals that you received for the hundred seventy-five dollar method?

A All the way down there were two hundred sixty-one carriers; number of trucks, twenty-one thousand eight hundred forty-three; truck miles in Arkansas, one hundred seventy-four million, one hundred forty-two thousand, two hundred forty-five; Arkansas truck miles per truck, seven thousand nine hundred seventy-two; HUE tax expense, three million eight hundred twenty-two thousand five hundred twenty- [1988] five dollars; HUE tax expense per mile, .0220.

Q And that .0220 is the figures reflected in the ATA study plus the figures that you computed from Plaintiffs' Exhibit 39 totally and then the average of those two figures?

A Yes, it is.

Q When you added that total to the total for the five cent option that you brought it up to reflect the proportion, what was the total cost per mile for foreign based carriers that you determined?

A The revised estimated cost per mile would be .0320.

Q And what was reflected in the ATA study over-all?

A That was .0358.

Q So there would be reduction by adding the hundred and seventy-five dollar option carriers who were not in the

ATA study, it would lower the figures by approximately three tenths of a cent. Is that correct?

A Yes.

• • • •

[1994] CROSS EXAMINATION

BY MR. GOODLOE:

Q Ms. Byrd, -did you do some computation on vehicles on the Hughes' ATA Survey on the Arkansas list and the out of state list on what it would cost some of those carriers [1995] to operate per mile based on the license fees? The license fees per mile?

A Yes, I did a sample schedule on both the Arkansas based and foreign based.

Q All right. The Arkansas based carriers on the ATA survey that you checked for accuracy of license fees, what was the range of license fees per mile?

A They range anywhere from eighty-four hundred . . . . eighteen to 19.88 cents per mile.

Q What was the average?

A The average was about 2.6 per mile.

Q What about the foreign based on the Hughes ATA survey?

A The foreign based companies ranged anywhere from fifty-five one hundredths of a cent to 1.8 cents per mile and that averages about 1.1 cents per mile.

Q And the comparison for the in-state and out-of-state license fees cost per mile?

A It's about two to one, approximately.

Q Do you have your work schedule?

A Yes, I do.

Q That bears out the work you did and what you just testified to?

[1996] A In regard to license fees, yes.

MR. GOODLOE: I'd like to have this marked Defendant's 14.

MR. SAYRE: No objections, Your Honor.

MR. GOODLOE: I would move to introduce Defendant's 14, Your Honor.

THE COURT: Without objection, Defendant's 14 will be received.

• • • •

BY MR. GOODLOE:

[1998] Q Now, again, why is it you feel that your data is not adequate?

A Here again, we're working with three apparently different systems that do not correlate.

Q Were you able to get sufficient numbers into the comparison also?

[1999] A No.

Q Did you perform any other work at the direction of Mr. Robertson or someone to verify the ATA survey?

A I did a verification worksheet.

Q What did you attempt to verify?

A Well. . . .

MR. GOODLOE: I would have this marked as Defendant's 15.

A We attempted to verify the vehicular mileage figures presented on the ATA report, which we compared them to IRP and motor fuel tax records.

Q How complete is this offered Defendant's Exhibit 15?

A Well, it is not a completed worksheet because we kept finding so many discrepancies. For example, one of the companies on my side, Lewis Transfer Company, we compared the ATA vehicle number, which was a hundred and two, to IRP, and there they registered a hundred and thirty-three. In comparing Arkansas mileage, the ATA report presented the figure five hundred forty-three thousand seven hundred [2000] fifty-three miles. IRP had three hundred seventy-two one hundred sixteen miles. Motor fuel tax had six hundred ninety-one thousand nine hundred thirty-eight miles. We found

instance after instance of discrepancies like this and just felt there was no need to continue.

• • • •

[TESTIMONY OF MR. HUGHES]

[2050] *Douglas A. Hughes*, having been called by and on behalf of the Plaintiffs, testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q Would you state your name and address for the record, please?

[2051] A Douglas A. Hughes, 8807 Tuckerman Lane, Potomac, Maryland.

Q What is your profession or employment, please, sir?

A I am Director for State Laws of the American Trucking Association headquartered in Washington, D.C.

• • • •

BY MR. SAYRE:

[2111] Q Mr. Hughes, I've handed you what's been marked Plaintiffs' Exhibit Number 52 and I will ask if [2112] you can identify that, please?

A Yes. This is an exhibit prepared by myself reflecting the total highway tax cost for a typical vehicle including registration cost, fuel cost and Highway Use Equalization Tax cost.

Q When you say for a typical vehicle, where did you get that information of a typical vehicle?

A The Federal Highway Administration every four or five years issues a publication entitled *Road User and Property Taxes on Selected Motor Vehicles*. The most recent such publication was issued just last year, 1982. That publication has a variety of vehicles in it ranging

from small passenger cars up to the heaviest truck combination. And for the kind of vehicle which we are considering here I selected one of the typical vehicles in that study and used it as a basis for making this comparison.

Q Which vehicle did you choose?

A It is a five axle tractor semi-trailer registered at a gross weight of seventy-eight thousand pounds and operating annually some seventy thousand miles.

* * * *

BY MR. SAYRE:

[2115] Q Would you identify that, sir?

A Yes. This is a Federal Highway Administration booklet entitled *Road User and Property Taxes on Selected Motor Vehicles* issued last year.

MR. SAYRE: Your Honor, I would offer Plaintiffs' 53 into evidence.

THE COURT: Now, what about it?

MR. PARKER: No objection to 53 being introduced.

THE COURT: Fifty-three will be received.

[THEREUPON, the document as identified was received in evidence as Plaintiffs' Exhibit Number 53 and is attached to this record under separate cover].

MR. SAYRE: (Continuing)

Q Would you describe to the Court, Mr. Hughes, what is the Road User and Property Taxes publication of the Federal Highway Administration of [2116] the United States Department of Transportation and your understanding of how it's been compiled and what it's used for?

A It is a publication issued by the Department periodically describing road user and property taxes on a variety of vehicles which are each described in exacting detail in table one. It starts on page 12 in the publication. It's on pages 12 and 13. The vehicle which we have used with respect to this case is vehicle number 11 which

is a three axle tractor pulling a two axle trailer, diesel powered. And a variety of characteristics of that vehicle are described in minute detail in Table One including its cost, its empty weight, its gross weight, its annual miles of operation, fuel consumption cost, etc.

Q With regard this data, how is it collected by the federal government?

A The federal governmental looks at the vehicle population in use and on that basis characterises these fifteen different types of vehicles in the vehicle population based upon a statistical sampling.

Q This includes everything from three categories [2117] of passenger cars, a number of single unit trucks from pickups to dump trucks and the semi-tractors up to the heaviest trucks and also even includes motorcycles?

A Yes.

Q Is this information within your industry generally recognized as a standard, or how is it used in your industry?

A We use it for a variety of statistical purposes as a basic reference in our office and the offices of each of our affiliated state associations. And it is my understanding that the Federal Highway Administration provides broad distribution of this, not only to the Federal Highway Administration offices around the country but also to a variety of state governmental offices.

Q And is this information utilized by the Federal Highway Administration itself when it testifies, say, before Congress with regard to cost, highway operating costs?

A My understanding is that they use that publication before Congress on a regular basis, yes.

Q All right. Then would you explain to the Court [2118] on Plaintiffs' Exhibit 52, which is the exhibit you have prepared extracting this information, what information you have used in this particular study?

A Well, the principal number drawn from Exhibit 53 used in our Exhibit 52 would be seventy thousand miles of annual operation for the vehicles everywhere.

Q What about the registration fee? What is that in Arkansas?

A For this typical vehicle qualified for operation at seventy-eight thousand pounds, the registration fee is one thousand forty-four dollars.

Q What about the fuel tax application?

A The fuel tax cost at ten and a half cents per gallon distributed over 5.1 miles per gallon certainly for the Arkansas based vehicles as well as the foreign based vehicles arithmatically works out to be 2.06 cents per mile.

Q And what about the Highway Use Equalization Tax we have in question here? How have you applied that or reflected that on this exhibit?

A In Exhibit 52, of course, since there is a dissimilar impact for Arkansas based and [2119] foreign based carriers we have reflected that based on our findings in Exhibit 45 and 46 reflecting the .89 cents per mile for the Arkansas based carriers and the 3.58 cents per mile for the foreign based carriers.

Q In your study what have you referred to as a foreign based carrier?

A Well, a motor carrier vehicle based registered in jurisdictions other than Arkansas. The same list of carriers found in Exhibit 45.

Q And what were the findings of the cost per mile of operation for these three types of taxes on a typical vehicle that would travel seventy thousand miles in the State of Arkansas?

A When these three tax costs are added together the total highway tax cost of the Arkansas based vehicle is 4.44 cents per mile. And, yet, because of the experience reflected in Exhibits 45 and 46, it is sixty-one percent higher, or 7.13 cents per mile, for the foreign based vehicle. The difference being the difference created by the Highway Use Equalization Tax.

Q Which would be a cost of almost two to one, is that correct? Or a hundred and seventy- [2120] five percent?

A The registration cost and the fuel tax cost are neutral. They are identical once you define your typical

vehicle and apply it equally both for Arkansas based and for foreign based. And when you add the three costs together the foreign based has a cost of sixty-one percent higher than the Arkansas based.

• • • •

BY MR. SAYRE:

[2122] Q I've handed you what was marked Defendants' Exhibit Number 11, Mr. Hughes, which was a representation, I believe, of a chart prepared by Ms. Gerke, the IRP clerk from the Revenue Division. In that study there are costs for registration, I believe, that are different, they are not the same. Would you explain the difference between Defendant's Exhibit Number 11 and Plaintiffs' Exhibit [2123] Number 52 on the representation of these costs?

A Exhibit 11 characterises three separate vehicles, each of which operated seventeen thousand miles in Arkansas, but operated a different total miles, so they're in fact very different vehicles. Vehicle one in Exhibit 11 operated a hundred and forty thousand miles, vehicle number three operated ninety-five thousand miles and vehicle two, in the example provided in Exhibit 11, operated a total of two hundred and twenty thousand miles in a year, which is a very high annual mileage. In fact, at fifty miles an hour he had forty-four hundred hours of operation in one year.

Q The typical truck the Federal Highway Commission comes up with, or Administration, comes up with seventy thousand miles traveled for that truck during that time frame. Is that correct?

A Annual mileage totally, yes. And registration cost is a function of total miles.

Q But the typical truck found by the Federal Highway Administration traveled seventy thousand miles a year, one of the five axle, heavy, seventy-eight thousand plus, registered trucks?

A Yes.

[2124] Q As opposed to some two hundred thousand miles a year?

A That is correct.

Q All right.

A Frankly, with respect to Exhibit 52, in characterising the registration cost of one thousand forty-four dollars we have spread it over the seventy-thousand miles and we get 1.49 cents per mile. That would be true whether it be an Arkansas based vehicle or a foreign based vehicle. It is a neutral tax. If that foreign based vehicle operated, for example, ten percent of its miles in Arkansas its fees to Arkansas would be ten percent of Arkansas' fees, a hundred four dollar forty cents, spread over seven thousand miles and you would still come out with this 1.49 cents per mile. When you apportion registration cost, regardless of the miles, it will be a neutral tax unless the vehicle operates a different total of miles. And I know of absolutely nothing that would suggest to me that Arkansas vehicles are operated any less efficiently than our vehicles base registered in other jurisdictions. So it is a neutral tax.

[2125] Q Again, based upon the total mileage of the vehicle operated?

A Yes. The only way that you would see vehicle registration costs reflected with a different cost per mile for Arkansas than foreign based is if their total miles were different. And the only way the Arkansas cost could be higher is if Arkansas vehicles were in fact operating less efficiently than vehicles base registered in other jurisdictions.

• • • •

REDIRECT EXAMINATION

BY MR. SAYRE:

[2169] Q Mr. Hughes, would you explain the difference [2170] between Plaintiffs' Exhibit 56 and 51 and where the changes are and where they came from?

A Yes. There's only one change really and it is in the display under the annual vehicle registration category of the arithmatic which led to the cost factor for registration of 1.49 cents per mile. We have looked separately at the typical vehicle based upon Arkansas miles as found in Exhibits 45 and 46 which are the ATA studies and we've calculated for the Arkansas based vehicles the registration fee showing nineteen thousand three hundred eighty-six miles in Arkansas of the total seventy thousand miles for an apportionment factor of 27.7 percent times the registration fee of one thousand forty-four dollars is a registration cost to Arkansas of two hundred eighty-nine dollars thirteen cents. That apportioned registration cost distributed over the nineteen thousand three hundred eighty-six Arkansas miles gives a registration cost of 1.49 cents per mile. And for the foreign based vehicle a similar calculation based upon two thousand three hundred eighty-nine Arkansas [2171] miles which leads to an apportion factor of 3.4 percent, a registration cost of thirty-five dollars and sixty-three cents spread over the Arkansas miles for a registration cost of 1.49 cents per mile. All other material in Exhibit 56 are identical to Exhibit 51.

Q The cost per mile for registration fee then has been computed utilizing the same base figures reported on the ATA study for total miles for foreign non-Arkansas based trucks and Arkansas based trucks?

A For Arkansas miles based upon the numbers in 45 and 46 and total miles, of course, is the seventy thousand miles, the typical vehicle identified in the Federal Highway Administration report.

Q And from your experience in the trucking industry —you testified of course what that experience is—would you say that seventy thousand miles for a heavy truck is an average or a median that is approximated?

A Yes.

Q And the result then on 56, Plaintiffs' 56, as opposed to 51 is exactly the same when you have the

Arkansas miles and—excuse me—[2172] the Arkansas miles of the Arkansas carriers and the Arkansas miles of non-Arkansas based vehicles added—or excuse me—utilized in making the apportionment, it would still come out to the same figure a seemingly typical vehicle in the government study?

A Yes, it will. Exhibit 56 graphically displays what I attempted, perhaps inadequately, this morning to explain.

• • • •

[TESTIMONY OF MR. RALLS]

[2255] *Rawleigh Ralls*, having been called by and on behalf of the Defendants, testified as follows:

DIRECT EXAMINATION

BY MR. GOODLOE:

Q Would you state your name and address for the record, please?

A My name is Rawleigh Ralls, I live here in Little Rock at 12901 South Ridge Drive.

Q How are you employed?

A I am employed as the president of a research oriented consulting firm also located here in Little Rock named Education Research Associates, Incorporated.

• • • •

BY MR. GOODLOE:

[2265] Q Dr. Ralls, did the Highway Department employ you in regard to this case?

A They have.

Q Would you explain to the Court the nature of your involvement concerning this case?

A Well, the nature of my involvement in this [2266] case goes back to, I think, a period sometime around the 4th of July this year. And you came and called on me

to ask my opinion as to certain aspects of what you and I have come to call the Hughes' survey. This was the preliminary finding from the sample of responses to the American Trucking Association questionnaire that Mr. Hughes has indicated previously that was sent out to a selected list. And I looked at the result of that survey and as well as the facts as best the State of Arkansas knew it at the time in July as to the true population of carriers, trucks and the choice of either option one or option two for the incremental tax of a hundred seventy-five dollars or, alternatively, in the form of five cents a mile. And I found that the respondents in the preliminary survey that had been turned over to you and you were having me look at were not representative of the population of the trucks registered in the State of Arkansas. That was my first involvement with you and my response. And, after I looked at the actual population and then the respondents' survey, I told you that the sample of the respondents to the survey were not [2267] representative of the population as a whole. And because they were not representative of the population as a whole then any numerical findings from that survey could not be used inferentially with respect to the population of carriers and trucks paying the tax in the State of Arkansas. That was the first thing.

• • • •

CROSS EXAMINATION

BY MR. SAYRE:

[2297] Q What percentage then of the total universe is represented by Plaintiffs' Exhibit 51?

A In terms of carriers about in excess of twenty percent. In terms of trucks, about seventy-five percent.

Q Seventy-five percent of the trucks?

A Yes.

Q So you would assume, or could you draw an inference, that a lot of small carriers did not respond?

A I think that's a fair implication from these numbers, yes.

Q All right. If seventy-five percent of the trucks are involved what about the number of dollars represented? What percentage is that of the universe?

A It should be proportionate.

[2298] Q In other words, another seventy-five percent?

A Of the taxes collected.

Q And. . . .

A It's almost nine million out of twelve million. I think that's the bottom line on the state collections.

Q And based upon that seventy-five percent response, the total cost per mile for operating both under the nickle a mile and the hundred seventy-five dollar option for all of those vehicles was 3.2 cents per mile?

A That's the incremental cost as it results from this tax as it has been accepted by the carriers at their option.

Q And what was the cost for the Arkansas registered carriers? The cost per mile?

A On this exhibit it shows slightly less than a penny.

Q Did you do any study of the Arkansas results that were received from the ATA study?

A No, I did not.

Q Well, if the . . . . as a statistician, if you assume that the cost of an incremental measure is 3.2 cents per mile for seventy-five percent of the trucks, that the cost for the other twenty-five [2299] percent would have to be totally different to make that cost come down to a penny a mile, would it not?

A It couldn't come down.

Q It could not come down?

A No.

Q So if you had the rest of the universe reflected under Plaintiffs' Exhibit Number 51 the cost would still not come down to a penny?

A I don't think that if the entire universe were reflected, that is, everyone responded to the American Trucking Association's survey, that you would have results that are terribly different from the 3.2 cents per mile for this incremental tax. I think it would be close to that value.

• • • •

BY MR. SAYRE:

[2300] Q So if the other twenty-five percent were available it still could not, or probably would not, be less than the three cents or 3.2 cents per mile?

A It would be approximately that value.

Q All right. So that you can draw the inference that from the data collected that the cost is at increments per mile, increments of operation there, would be approximately 3.2 cents per mile from the data that has been collected and compiled?

A As it's measured on a per mile basis, yes.

• • • •

BY MR. SAYRE:

[2301] Q From a rough analysis of that data then, you've drawn the conclusion that the cost will remain fairly constant if the other twenty-five percent were added, about 3.2 cents per mile?

A It's my opinion, Mr. Sayre, that if in fact everyone responded, you got the missing part [2302] of the population, that your cost per mile figures that are shown here on this would not be drastically different from those shown here on Plaintiffs' Exhibit 51.

• • • •

PLAINTIFFS' EXHIBIT 6

INTERNATIONAL REGISTRATION PLAN

with official interpretations

AMERICAN ASSOCIATION of MOTOR VEHICLE ADMINISTRATORS

Adopted 9/13/73

Revised as amended 4/1/82

FOREWORD

The International Registration Plan is a registration reciprocity agreement among states of the United States and provinces of Canada providing for payment of license fees on the basis of fleet miles operated in various jurisdictions.

The unique feature of this Plan is that even though license fees are paid to the various jurisdictions in which fleet vehicles are operated, only one (1) license plate and one (1) cab card is issued for each fleet vehicle when registered under the Plan. A fleet vehicle is known as an apportionable vehicle and such vehicle, so far as registration is concerned, may be operated both interstate and intrastate.

The International Registration Plan is a product of the American Association of Motor Vehicle Administrators and, thus, is recommended for adoption by all jurisdictions.

AMERICAN ASSOCIATION OF
MOTOR VEHICLE ADMINISTRATORS
1201 Connecticut Ave., N.W.
Washington, D.C. 20036

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AMERICAN TRUCKING ASSOCIATIONS, INC.

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TEXTUAL NOTE

Throughout this publication of the International Registration Plan the specific provisions of the agreement are presented in this ten point Times Roman type.

The agreement has been the subject of interpretation under the provisions of Article XIX.D, and as a result of this effort, two types of commentary are included herein.

[The commentary provisions not voted by the member jurisdictions, are shown in this smaller eight point Times Roman type.

The "official commentary," voted by the member jurisdictions under the provisions of Article XIX.D, is shown in this eight point italic Times Roman type.]

INTERNATIONAL REGISTRATION PLAN

I—Purpose and Principle

[This Article sets forth the guiding purposes and principles of the International Registration Plan (herein cited as the IRP or Plan) as envisioned by its drafters.

The Plan should be construed in accordance with its underlying purposes and principles. The text of each Article should be read in the light of the purpose or principle of the provision in question, as well as those of the Plan as a whole; and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and principles involved.]

A. This reciprocal agreement shall be referred to, cited and known as the International Registration Plan.

[This Section indicates the official name of the "reciprocal agreement." Because the participation of the Provinces of Canada was anticipated, the term "international" was ultimately included. (See page 2, Minutes of the AAMVA Ad Hoc Committee Meeting to Develop Implementation for National Proportional Registration held in Washington, D.C., on May 30-31, 1973.) *The term "reciprocal agreement" is used here to indicate that participating jurisdictions mutually agree to provide for reciprocal vehicle registration unless appropriate exceptions to Plan provisions are approved pursuant to Article XVII.* (See commentary under Article I.E.).]

B. It is the purpose of this agreement to promote and encourage the fullest possible use of the highway system by authorizing the proportional registration of fleets of vehicles, and the recognition of vehicles proportionally registered in other jurisdictions, thus contributing to the

economic and social development and growth of the jurisdictions.

[*Freedom of vehicle movement is a fundamental principle of the Plan. This freedom is to be attained by authorizing the "proportional registration" of fleets of vehicles.* (The term "proportional registration" is not defined in Article II definitions, but is explained under fleet registration fee determination in Article III: see commentary thereunder.) *Proportional registration promotes and encourages the fullest possible use of the highway system, thereby ". . . contributing to the economic and social growth of the jurisdiction."* (Most of this provision is taken from the Uniform Vehicle Code.) *The "proportional registration" system makes possible greater flexibility of commerce between and among the participating jurisdictions. Such efficient use of the highway system is beneficial to the economic and social growth of the member jurisdictions.*

Freedom of vehicle movement is achieved through official "recognition" of proportionally registered vehicles in all member jurisdictions. If a fleet is registered pursuant to the IRP in the "base jurisdiction" and appropriate fees are paid to other member jurisdictions through which the registrant intends to operate such fleet, "recognition" of the base jurisdiction's distinctive identification plates for that fleet is authorized. (The choice of terms in this provision may give rise to some confusion unless read in the light of the Plan's overall purpose. The commentary on Articles I.C., I.D., I.E. and II.K. develops this concept in more depth.)]

C. It is the purpose of this agreement to implement the concept of one registration plate for one vehicle.

[*Only one identification plate is issued to each vehicle for purposes of vehicle registration. Under the*

IRP, only the "base plate" is required; no other exterior vehicle registration identification is allowed for licensing purposes. (Under the Uniform Vehicle Registration Proration and Reciprocity Agreement, in contrast, each vehicle carries a so-called "backing plate" upon which the member jurisdictions may require the annual placement of a "sticker" or "decal" indicating currently valid registration, in addition to the base jurisdiction's registration plate); (See Article XVII.E).]

D. It is the purpose of this agreement to grant exemptions from payment of certain fees when such grants are reciprocal.

[The drafters of the Plan recognized that not all fees are apportionable fees and they wanted to encourage reciprocity on those non-apportionable fees. *Those non-apportionable fees under this section may be subject to exemption under separate reciprocal agreements.* (See Article III.B. and commentary thereunder.)]

E. It is the purpose of this agreement to grant reciprocity to proportionally registered fleets of vehicles, and to provide for the continuance of reciprocity granted to those vehicles that are not eligible for proportional registration under the terms of this agreement.

[*Proportionally registered fleets of vehicles must be granted "reciprocity." Fleets of vehicles not so registered are subject to pre-existing registration requirements but may, nevertheless, be granted "reciprocity." Vehicles displaying "restricted plates," such as farm vehicles for example, may be exempt from additional fees if the jurisdiction's law, applicable agreements, understandings or declarations so provide. Fleets of vehicles properly registered under the IRP are not charged additional fees by member jurisdictions unless such fees are authorized under*

Article III.B. (See commentary thereunder.) *The IRP, therefore, provides for an exemption from such additional fees. The IRP is a reciprocity agreement providing for ". . . the recognition of fees paid to other jurisdictions."* (See page 2, Minutes of the AAMVA Ad Hoc Committee Meeting held in Dallas, Texas on December 5-6, 1972.)

The IRP speaks of "reciprocity" both as to vehicles registered pursuant to it, as well as to those not so registered. (The Uniform Vehicles Registration Proration and Reciprocity Agreement, in contrast, speaks of "reciprocity" only in the latter instance. Article V of that agreement provides for "reciprocity" to vehicles not registered thereunder, but does not provide that proportionally registered vehicles are receiving "reciprocity".) *The IRP is, therefore, construed to be a "reciprocity agreement."* (See page 2, Minutes of the AAMVA Ad Hoc Committee meeting held in Washington, D.C., May 30-31, 1973.) *"Reciprocity Agreement" is not defined, but is construed to mean:*

An agreement, arrangement or understanding governing the reciprocal grant of rights and/or privileges to vehicles which are based in and properly registered under the applicable laws of the jurisdictions which are parties to such an agreement, arrangement or understanding.]

II—Definitions Applicable to This Agreement

A. "Apportionable Fee" means any periodic recurring fee required for licensing or registering vehicles, such as, but not limited to, registration fees, license or weight fees.

[*This provision describes the type of fees to be apportioned. The key words are "periodic" and "recurring." A registration, license or weight fee is*

only apportionable if it is a "periodic recurring" fee.]

B. "Apportionable Vehicle" means any vehicle, except recreational vehicles, vehicles displaying restricted plates, city pick up and delivery vehicles, buses used in transportation of chartered parties, and government-owned vehicles, used or intended for use in two or more member jurisdictions that allocate or proportionally register vehicles and is used for the transportation of persons for hire or designed, used or maintained primarily for the transportation of property and:

1. is a power unit having a gross vehicle weight in excess of 26,000 pounds; or

2. is a power unit having three or more axles, regardless of weight; or

3. is used in combination, when the weight of such combination exceeds 26,000 pounds gross vehicle weight.

Vehicles, or combinations thereof, having a gross vehicle weight of 26,000 pounds or less and two-axle vehicles may be proportionately registered at the option of the registrant.

[*Fleets of vehicles are determined to be apportionable according to the characteristics and use of the vehicle or the "combination" of vehicles. Articles II.B.1. and II.B.2. refer solely to power units and are so construed. For purposes of Article II.B.2, an "axle" includes a so-called "dummy," "drag," "tag" or "pusher" type axle. Article II.B.3 refers to any vehicle (power unit or trailing unit) used within a combination which exceeds 26,000± gross vehicle weight. Trailers, however, are only apportioned under the Plan pursuant to an approved exception unless subject to Article XI.* (See Articles IV.C and XI.)

A vehicle or combination of vehicles falling within any of the three enumerated classifications is apportionable, if it is, a) used for the transportation of persons for hire, or, b) designed, used or maintained primarily (but not necessarily exclusively) for the transportation of property, and, c) ". . . used in two or more jurisdictions that allocate or proportionally register vehicles . . .

A vehicle or combination of vehicles which travels in two or more IRP jurisdictions, but which is not otherwise within the definition of "apportionable vehicle," may be proportionally registered if the registrant so chooses. Vehicles not proportionally registered are subject to registration and fee payment in accordance with each base jurisdiction's general registration statutes and may be entitled to reciprocity in other jurisdictions under applicable reciprocity agreements. (See Articles I.E. and XVIII and commentary thereudner; see also page 2, Minutes of the Kentucky Dam Village Meeting held September 27-28, 1972.)]

C. 1. "Base Jurisdiction" means, for purposes of fleet registration, the jurisdiction where the registrant has an established place of business, where mileage is accrued by the fleet and where operational records of such fleet are maintained or can be made available in accordance with the provisions of Article XIV, A(2).

[*This section provides a three-part test for the determination of base jurisdiction.* During the drafting of the Plan, this definition was revised several times. Originally, the "base jurisdiction" was the jurisdiction where the registrant, 1) had his principal place of business, and, 2) where the financial records of the firm as well as the records on vehicle operations were kept and could be inspected.

The definition was revised to delete the word "principal" and all reference to financial records. A re-

quirement that the fleet accrue mileage within the base jurisdiction was added. This definition was later amended by official ballot action to add the words "or can be made available in accordance with the provisions of Article XIV.A.2." after the term "maintained." (Final approval dated July 30, 1976.)

Prior to the passage of the Amendment a serious question arose regarding the need to maintain operational records of a fleet in the "base jurisdiction." As a matter of business practice many companies did not do so and considerable expense and time-consumption would have resulted from literal enforcement of that provision. Consequently, the administrators amended the Plan to allow the records to be maintained outside the "base." (See Article XIV.A.2. and Minutes, AAMVA Legal Affairs Subcommittee Meeting held in Houston and Austin, Texas, January 6-8, 1976.)

The fundamental principal of operational flexibility is again involved here. Industry representatives were concerned that a restrictive definition would reduce that flexibility. Administrators, on the other hand, were concerned that registrants might use the flexibility provided to avoid registration fees by choosing a base jurisdiction which does not claim "reciprocity miles."

It is not now, and never has been, the intent of the Plan to permit a registrant to use the flexible provisions of this section in changing his base jurisdiction as a device to avoid the payment of registration fees on a 100% mileage basis. (See commentary under Article II, Section G.) *The three-part test requires: 1) an established place of business, 2) fleet mileage accrual, and 3) maintenance of operational records or record availability under Article XIV.A.2.*

Although "an established place of business" is not defined, it is construed to mean:

> *". . . a psychical structure owned, leased or rented by the fleet registrant the location of which is designated by street number or road location, and which is open during normal business hours; and in which are located:*
>
> *1) a telephone or telephones publicly listed in the name of the fleet registrant,*
>
> *2) a person or persons conducting the fleet registrant's business, and,*
>
> *3) the operational records of the fleet (unless such records can be made available in accordance with the provisions of Article XIV.A.2.)"*

A question has arisen whether all vehicles of a fleet must accrue miles within the jurisdiction chosen as "base." If this interpretation were adopted, the registrant would be forced to make certain that every vehicle of a fleet travelled some of its miles in the "base" each year. This requirement would contravene the purpose of granting operational flexibility, discussed under Article 1.B. *The Plan is construed broadly to require only the accrual of miles by the fleet as a whole; each vehicle need not individually enter the base jurisdiction.*]

2. Registrants based in any jurisdiction not a member of this agreement, and who have been licensing vehicles in any member jurisdiction under basing point, allocation or proration, may declare the member jurisdiction where the most miles have been operated as a base jurisdiction for purposes of this agreement until such time as the registrant's base jurisdiction becomes a member of this agreement.

[*Registrants "based" in a non-member jurisdiction may obtain the benefits of Plan membership by initially declaring as a "base" the IRP member jurisdiction within which the most miles have been operated, without regard to the three-part test provided in Article II.C.1.* However, a question arises whether the "base" declaration must be changed upon membership approval of the previous "non-member." Because this provision authorizes such a declaration of "base" only ". . . until such time as the registrant's base jurisdiction becomes a member . . ." the implication is that the new member must become the new "base." However, this assumes that the registrant's bona fide "base" was and continues to be in the new member jurisdiction. Since the three-factor test for determining "base" is intended to provide a reasonable degree of flexibility to fleet operations, the registrant could decide to base his fleet (or fleets) in jurisdictions other than his former "base." *The Plan is construed to require a change in "base" only if the three-factor test is not met in the "declared base."* For example, assume:

(1) the registrant has historically operated fleet A from a place of business in jurisdiction X, a non-member of IRP; (2) fleet A accrues more of its mileage in IRP jurisdiction Y than in any other IRP jurisdiction but has no established place of business there; (3) fleet A declares jurisdiction Y as its base pursuant to this provision; (4) jurisdiction X then becomes an IRP member: The clear result is that the registrant must change its "base" to jurisdiction X. However, if the registrant has an established place of business in jurisdiction Y (or in any other IRP jurisdiction) when jurisdiction X becomes a member, the Plan does not require that the "base" declaration be changed to X. It is possible that the registrant will have closed his place of business in

X and, consequently, would be prohibited from declaring X as "base."]

3. Household Goods Carriers using equipment leased from service representatives may elect, with respect to such equipment, to base such equipment in the Base Jurisdiction of the service representative, or that of the carrier.

For equipment owned and operated by owner-operators, other than service representatives, and used exclusively to transport cargo for the household goods carrier, the equipment shall be registered by the carrier in the Base Jurisdiction of the carrier, but in both the owner-operator's name and that of the carrier as lessee, with the apportionment of fees according to the records of the carrier.

[See commentary on Articles IV.E and IX.]

D.1. "Base Plate" means the plate issued by the Base Jurisdiction and shall be the only registration identification plate issued for the vehicle by any member jurisdiction.

[See Article XVII.E.1]

2. Base plates shall be identified by having the word "Apportioned" and the jurisdiction's name on the plate. The numbering system and color shall be determined by the issuing jurisdiction.

E. "Commissioner" means the jurisdiction official in charge of registration of vehicles.

F. "Fleet" means one or more apportional vehicles.

G. "In-Jurisdiction Miles" means the total number of miles operated by a fleet of proportionally registered vehicles in a jurisdiction during the preceding year. In those cases where the registrant operated a fleet of proportionally registered vehicles in jurisdictions that require no apportionment and grant reciprocity, the base

jurisdiction may add such miles to the in-jurisdiction miles.

[The Plan does not define the term "reciprocity" in this context and Article II.K "reciprocity" does not apply since that provision deals with "reciprocity" granted by member jurisdictions only. However, the concept is one of vehicle operation in non-member jurisdictions at no licensing or registration cost to the registrant. *If a non-member jurisdiction requires the registrant to obtain a permit or permits and collects fees therefore or collects other fees in lieu of registration, it cannot be said that "reciprocity" is being granted. The term "in-jurisdiction miles" is construed to include only those miles actually travelled within a member jurisdiction and in the case of the base jurisdiction it may include those miles travelled in non-member jurisdictions which impose no fees for, or in lieu of, vehicle registration.*]

H. "Jurisdiction" means a state, territory or possession of the United States, the District of Columbia, or a state or province of a country.

I. "Operational Records" means documents supporting miles traveled in each jurisdiction and total miles traveled such as fuel reports, trip sheets and logs.

[*"Operational records" refers to source documents suitable for verification of fleet mileage, known as "Individual Vehicle Mileage Records" (IVMRs). An IVMR must contain the information set forth in the Uniform Operational Audit Procedure Guidelines which are herein incorporated by reference.* (See commentary under Article XIII and XIV.)]

J. "Preceding Year" means the period of twelve consecutive months immediately prior to July 1st of the year immediately preceding the commencement of the registration or license year for which proportional registration is sought.

K. "Reciprocity" means that an apportionable vehicle properly registered hereunder shall be exempt from further registration by any other member jurisdiction.

[See Articles I.A. and I.E.]

L. "Recreational Vehicle" as used in this agreement is one used for personal pleasure or travel by an individual or his family.

[*The term "recreational vehicle" refers to vehicles such as "campers," "house trailers," "motor homes" and "mobile homes" when used exclusively for personal pleasure and travel by an individual and his family. In order to qualify as a "recreational vehicle," it must not be used in connection with any business endeavor* (see page 3, Minutes of the AAMVA Ad Hoc Committee Meeting held in Washington, D.C., May 30-31, 1973). *When a recreational vehicle is being transported by a vehicle transporter, its weight must be included in the gross vehicle or combination weight of the transporting vehicle or combination of vehicles for purposes of determining appropriate registration fees. This requirement is clear since it is the registration of the vehicle transporter which is being considered here and the nature of the property transported is irrelevant.* (See Article II.B.3.)]

M. "Registrant" means a person, firm or corporation in whose name or names a vehicle is properly registered.

[*The term "registrant" is defined broadly so as not to exclude service representatives and rental companies from the classification.* (See commentary under Articles IV.E. and XI.)]

N. "Registration Year" means the twelve month period during which the registration plates issued by the base jurisdiction are valid according to the laws of the base jurisdiction.

O. "Restricted Plate" means one that has time (less than a registration year), geographic area, mileage or commodity restriction.

P. "Service Representative" means one who furnishes facilities and services including sales, warehousing, motorized equipment and drivers under contract or other arrangements to a carrier for transportation of property by a household goods carrier.

Q. "Total Miles" means the total number of miles operated by a fleet of proportionally registered vehicles in all jurisdictions during the preceding year.

[*"Total miles" means miles traveled by a fleet in all jurisdictions during the preceding year. This provision is not construed so as to limit "total miles" to miles traveled in member jurisdictions.*]

R. "Chartered Party" means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the Interstate Commerce Commission, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartered group after having left the place of origin.

[This definition was added by amendment effective January 1, 1975, and was made necessary by the amendment to Article II.A. excluding "buses used in transportation of chartered parties" from the definition of an "apportionable vehicle."]

III—Fees for Proportional Registration

A. The registration fee for apportionable vehicles shall be determined as follows:

1. Divide the in-jurisdiction miles by total miles generated during the preceding year.

2. Determine the total fees required under the laws of each jurisdiction for full registration of each vehicle at the regular annual or applicable fees, or for the unexpired portion of the registration year.

3. Multiply the sum obtained under Paragraph 2 of this section by the quotient obtained under Paragraph 1 of this section.

[See Articles II.G., II.Q. and commentary thereunder.)]

B. This agreement does not waive any fees or taxes charged or levied by any jurisdiction in connection with the ownership or operations of vehicles other than the apportionable fees are defined herein. All other fees and taxes shall be paid to each jurisdiction in accordance with the laws thereof.

[This section authorized the collection of all fees and taxes which are not "apportionable fees" as defined in Article II.A. *Whether a "fee" or a "tax" is involved, it may only be collected "in accordance with the laws" of the jurisdiction imposing the fee or tax. The fee or tax must be set or authorized by statute. A proliferation of such fees or taxes, however, may result in impeding the free movement of commerce among the member jurisdictions. This result would tend to contravene the purpose set forth in Article I.B.* (see commentary thereunder).]

IV—Application for Proportional Registration

A.1. An applicant for proportional registration shall file a uniform application with the Commissioner of the base jurisdiction in lieu of registration under other applicable statutes.

[*This section requires the filing of a uniform application with the Commissioner of the base jurisdiction. The application form adopted for use shall be used by all member jurisdictions and is hereby incorporated by reference.* (Forms for this purpose were developed by the American National Standards Institute D19.4 Subcommittee on Uniform Documents and Record, approved as to form in July 1975; see page 10, Minutes of the AAMVA IRP Procedures Conference held in Jackson, Mississippi, July 22-24, 1975.)]

2. Whenever the base jurisdiction of a registrant changes as a result of the conditions described in Article II.C.2., the re-registration of the registrant in the new jurisdiction shall be accomplished through orderly and equitable procedures to be established by the Commissioners of the two jurisdictions involved.

[*This section requires the establishment of orderly and equitable procedures by the Commissioners of the jurisdictions involved in a change of "base" under Article II.C.2. conditions. This provision for the ad hoc development of procedures to effect the "base" change. If such procedures result in the duplication of registration fee payment, they are deemed not to be "equitable" and, therefore, shall not be authorized under this section.*]

B. Applications for proportional registration shall be filed on a date as determined by the base jurisdiction. Every application for proportional registration shall, at the time and in the manner required by the Commissioner, be supported by the payment of the registration

fees in the amount determined in Article III, provided, however, the Commissioner may, by regulation, postpone payment of fees until after the Commissioner has computed the fees due.

[This section allows the base jurisdiction to determine the date by which applications must be filed, since the base (with a few exceptions) is the only jurisdiction involved in the filing of applications. This provision also authorizes the Commissioner to postpone or delay payment of fees "until after the Commissioner has computed the fees due." This option avoids duplicate effort in those cases where the registrant might have made an error in fee calculation. Such procedures must be established by regulation under the Plan's explicit terms and should provide notice of the due date of the application and other pertinent requirements.]

C. The applicant for proportional registration of trailers, semi-trailers, and auxiliary axles shall use the application form for such vehicles and the apportionment of registration fees shall be computed by using the same factor determined by in-jurisdiction and total miles in Article III and this shall be applied to the registration fee. Jurisdictions may waive trailer, semi-trailer and auxiliary axle apportionment. Jurisdictions requiring proportional registration of trailers, semi-trailers and auxiliary axles shall provide for such requirement by filing an exception as described in Article XVII.

[*This section allows for the proportional registration of "trailers, semi-trailers and auxiliary axles" pursuant to an approved exception. The Plan does not define the terms "axle," "auxiliary axles," "semi-trailers" or "trailers." These terms are construed to mean:*

Axle—An assembly of a vehicle consisting of two or more wheels whose centers are in one

horizontal plane, by means of which a portion of the weight of a vehicle and its load, if any, is continually transmitted to roadway. For purposes of registration under the IRP, an "axle" is any such assembly whether or not it is load-bearing only part of the time. For example, a single-unit truck with a steering axle and two axles in a rear-axle assembly is an apportionable vehicle even though one of the rear axles is a so-called "dummy," "drag," "tag" or "pusher" type axle.

Auxiliary Axles—An auxiliary undercarriage assembly with a fifth wheel and tow bar used to convert a semi-trailer to a full trailer.

Semi-Trailer—Every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that some part of its weight and that of its load rests upon or is carried by the towing vehicle.

Trailers—Every vehicle without motive power, designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle.

The drafters were cognizant of the American Association of Motor Vehicle Administrators' (AAMVA) policy encouraging the adoption by all jurisdictions of a license or registration fee system in which the major portion of the fee would be on the power unit (the so-called "power-unit licensing system"). Consequently, this Article requires jurisdictions applying for membership to file an exception under Article XVII if trailers, semi-trailers and/or auxiliary axles are to be proportionally registered. However, a question arises as to whether such an exception should

require approval of all current members. A jurisdiction's exception on this item should receive approval unless the fees applicable to trailers, semi-trailers and/or auxiliary axles are not based on a split-fee registration system under which they are payable in full to the base jurisdiction with no apportionment to other apportionment to other jurisdictions. If a jurisdiction has a true "split-fee" registration system—wherein the method of fee determination for non-power units is the same as or substantially similar to the method applicable to power units—its membership should not be delayed or denied in an effort to force it to adopt a "power-unit licensing system." (See page 6, Minutes of the AAMVA Ad Hoc Committee Meeting held in St. Louis, Missouri, October 15-16, 1973).]

D.1. The application shall contain the number of power units, number of trailers, semi-trailers and auxiliary axles, with such vehicle description as may be required by the jurisdictions concerned and a uniform mileage schedule.

[This section recognizes the fact that some jurisdictions may need a more detailed vehicle description than others, although the form must be uniform. This problem was solved by providing enough columns in the application form to satisfy all requirements in all jurisdictions. Consequently, although one jurisdiction may need descriptive detail not needed by another, the format of the application form remains uniform.]

2. The base jurisdiction, after receiving its proportionate fees shall supply the necessary identification plates and prepare cab cards, listing on the front of the cab cards the jurisdictions where the vehicles are proportionally registered, the weight for which registered and other necessary information in each of the jurisdictions.

The base jurisdiction may, in its discretion, withhold issuing plates and cards until it has received evidence of payment due other member jurisdictions.

[Sections D.2 and D.3 set forth the vital base jurisdiction responsibilities essential to the proper functioning of the Plan. Only the base jurisdiction issues the "identification plate" and "cab card." No exception to this principle may be taken (see Article XVII). The weight for which the vehicle is registered must be listed on the face of the registration card so that enforcement personnel can know whether a vehicle is operating in excess of its registered weight. It should be noted, of course, that even though a vehicle is properly registered in its base jurisdiction with regard to declared gross weight, it must also comply with existing weight laws or regulations in other jurisdictions into or through which it is expected to operate.

For example, the payment of registration fees in jurisdiction X at a declared gross combination weight (GCW) of 80,000# does not authorize the operation of that vehicle at 80,000# in jurisdiction Y whose legal weight limit is lower (although in some instances "overweight permits" may be obtainable).

The term "and other necessary information" in Article IV.D.2. refers to that information required by registration and licensing statutes and is not construed to require unrelated information (fuel use tax account numbers, PUC/PSC authority, axle mile tax account numbers, etc.).

The base jurisdiction has the option of withholding identification indicia until it has evidence of fee payment to all other member jurisdictions (Article IV. D.2.). The purpose of this option is to allow withholding the privilege of vehicle operation under ap-

portionment until all IRP jurisdictions have received appropriate fee payment.]

3. The base jurisdiction shall notify the other declared jurisdictions that a proportional registration application has been filed, and shall furnish the declared jurisdiction a uniform mileage schedule.

[This section imposes an obligation on the base jurisdiction to notify the other members that an application has been filed and to forward each jurisdiction a copy of the Uniform Mileage Schedule. ("Uniform Mileage Schedule" refers to Schedule B.)]

4. All plates and cards and reciprocal exemptions are subject to cancellation and revocation in the event of erroneous issuance thereof, or if any fees remain unpaid.

[This section grants the base jurisdiction the power to cancel or revoke "all plates and cards and reciprocal exemptions" if erroneously issued ". . . . or if any fees remain unpaid." *The intent of this provision is clear—the failure to pay one jurisdiction's fees may lead to inability to operate in any jurisdiction.* This power is not to be used lightly, but is necessary to practical and equitable operation under the Plan. (See Articles XIII, XIV and commentary thereunder.)]

5. The base jurisdiction shall cooperate with other declared jurisdictions in connection with applications and fees paid.

[This section requires the base jurisdiction to "cooperate" with other members ". . . in connection with applications and fees paid." *This provision is construed, in part, to require the base jurisdiction to assist another member in the collection of fees due if a registrant fails to pay such fees*].

E. In those cases where Household Goods Carrier equipment is elected to be registered in the base juris-

diction of the service representative, the equipment shall be registered in said service representative's name and that of the carrier as lessee with the apportionment of fees according to the combined records of the service representative and those of the carrier, and such records must be kept or made available in the service representative's base jurisdiction.

If the election is the base jurisdiction of the carrier, and such jurisdiction is a member jurisdiction, the equipment shall be registered by and in the name of the carrier and that of the service representative as lessor with the apportionment of fees according to the records of the carrier and the service representative which must include intrastate miles operated by those vehicles applicable under this agreement, and the records must be kept or made available in the base jurisdiction of the carrier. Service representatives properly registered under this election shall be fully registered for operations under their own authority as well as under the authority of the carrier.

[This section sets forth procedures applicable to household goods carriers' operations. *The names of both the lessee-carrier and lessor-service representative (or vehicle owner) must be shown since the equipment is operated on an intermittent basis under the lessee-carrier's interstate operating authority, pursuant to Interstate Commerce Commission regulations, and the lessor-service representative's local and/or intrajurisdictional operating authority pursuant to regulations promulgated by a state or province. Intrajurisdictional mileage records are maintained by the lessor-service representative and interjurisdictional mileage records are maintained by the lessee-carrier and furnished to the lessor-service representative.*

Mileage records must be maintained or made available in the jurisdiction selected as the base jurisdiction, which must be that of the service representative or carrier. (See Article II.C.3. power of election.)]

V—Registration of Apportionable Vehicles

A. The Commissioner of the base jurisdiction shall register apportionable vehicles upon application and payment of the registration fees as provided in Articles III and IV. Payment of additional fees for each vehicle so registered may be required by the Commissioner of the base jurisdiction, in an amount provided by statute or regulation of the base jurisdiction for issuance of a plate. A registration card shall be issued for each vehicle registered by the Commission of the base jurisdiction and the card shall appropriately identify the vehicle for which it is issued, list the jurisdictions in which the vehicle has been apportioned, the weight and classification of fee for which registered according to the applications and payments furnished by the applicant. Such registration card shall be carried in or upon the vehicle, for which it has been issued, at all times.

[*Only the base jurisdiction may charge a fee for the issuance of an identification (license) plate, which is in addition to the proportional registration fee determined under Article III.A., since only the base jurisdiction may issue such a plate.* (See Articles I.C., IV.D.2. and commentary thereunder, and Article XVII.E.1). *Any such fee must be established by statute or legally valid regulation in order to be an authorized fee under the Plan.* (See page 7, Minutes of the AAMVA Ad Hoc Committee Meeting held in Phoenix, Arizona, July 24-25, 1973.)

Only the base jurisdiction may issue a registration (cab) card, which must identify the vehicle for which it is issued, identify the jurisdictions into and through which the vehicle may operate and show the weight

and classification of fee for which the vehicle is registered.]

B. Vehicles registered as provided in Section A of this Article shall be deemed fully registered in all jurisdictions where proportionally registered for any type of movement or operation provided the registrant has proper interstate or intrastate authority from the appropriate regulatory agency or is exempt from regulation by the regulatory agency.

[*Vehicles registered as provided in Section A are fully registered for any type of movement or operation, provided appropriate regulatory authority is held, if necessary. Since some jurisdictions' statutes require the payment of full registration fees in the event a vehicle is to be operated intrajurisdictionally (vehicle movement point to point within a single jurisdiction), it was believed necessary to add a provision indicating that proportionally registered vehicles are "deemed fully registered" even though full fees have not been paid. This provision should be construed in light of its purpose, i.e., to make intrajurisdictional operations possible with only a proportional payment of fees. This provision should not be construed so as to cause the imposition of other fees and taxes (state, federal or provincial) not otherwise applicable under statute. It should be noted in this connection that the IRP is a "reciprocity agreement," as discussed in the commentary on Article I.E.—Vehicles proportionally registered pursuant to the IRP are receiving "reciprocity" and are exempt from "further registration . . ."* (See Article II.K. and commentary thereunder.)].

C. There shall be no minimum vehicle fees for any apportionable vehicle, except those statutory fees for issuance of identifications or filing of applications.

[It was the intention of the drafters of the Plan to authorize only those "minimum vehicle fees" set by

statute for issuance of identification by the base jurisdiction or for filing of application with the base jurisdiction. Although this intention is not entirely clear from the Minutes of the final AAMVA Ad Hoc Committee Meeting held in Phoenix, July 24-25, 1973, it may be discerned from a reading of all meeting minutes wherein this subject is discussed. Since one of the fundamental purposes of the Plan is to provide for the processing of applications and issuance of identification by the base jurisdiction only, it would be incongruous to authorize the collection of fees for those responsibilities by other than the base jurisdiction. *This provision is construed to authorize the imposition of such "minimum vehicle fees" by the base jurisdiction only. Such fees must be set by statute to comply with the Plan's intent.*]

D. Registrants shall register all owner-operator vehicles on the basis of the registrant's (lessee's) mileage figures for the preceding year.

VI.—Registration of Additional Fleet Vehicles

A. Vehicles acquired by the registrant after the commencement of the registration year and added to the proportionally registered fleet shall be registered by applying the mileage percentage used in the original application for such fleet for such registration period to the regular registration fees due with respect to such vehicles for the remainder of the registration year.

B. All applications for additional fleet vehicles shall be filed and processed in the same manner as the original application.

VII—Withdrawal of Fleet Vehicles, Credits, Replacement Vehicles and Accounting

A. If a vehicle is withdrawn from a proportionally registered fleet during the period for which it is registered, the registrant of such fleet shall so notify the

Commissioner on appropriate forms provided by the Commissioner. The Commissioner shall require the registrant to surrender the cab card and identification plates to the base jurisdiction with respect to any such vehicle. If a vehicle is permanently withdrawn from a proportionally registered fleet because it has been destroyed, sold or otherwise completely removed from the service of the registrant, the unused portion of the fees paid with respect to such vehicle, where permitted by statute, shall be refunded by each jurisdiction or be applied against liability of such registrant for subsequent additions to such fleet during such registration year or for additional fees upon audit.

[*This section requires the granting of refunds or "credits" by each jurisdiction (if authorized by statute) if a vehicle is "permanently withdrawn" from a proportionally registered fleet.* "Permanently withdrawn" includes destruction, sale or other complete removal from the registrant's fleet. The term "where permitted by statute" was included in recognition of the fact that some jurisdictions were not statutorily authorized to grant refunds or allow credits. Original language would have granted the registrant an "election" to determine whether he wanted a refund or credit. This provision was later revised to delete the reference to an "election," thus, in effect, allowing the jurisdiction to determine whether a refund or credit is appropriate. (See page 7, Minutes of the AAMVA Ad Hoc Committee Meeting held in Phoenix, Arizona, July 24-25, 1973, and attachments.)]

B. If the registrant is replacing a vehicle for one withdrawn from the fleet and such vehicle is of the same weight category as that replaced, the registrant shall file a supplemental application with the base jurisdiction. The base jurisdiction shall in accordance with provisions in Article VI.B, issue a new cab card and transfer the identification plates to the new vehicle. When a replaced vehicle is of a greater weight or requires a larger registration fee, the registrant shall file the re-registration with the base jurisdiction in the manner set forth in Article VI for the registration of additional fleet vehicles.

[This section provides that the registrant must file the re-registration with the base jurisdiction pursuant to Article VI ". . . when a replaced vehicle is of greater weight or requires a larger registration fee. . . ." *The term "replaced vehicle" is construed to mean "replacement vehicle."*]

VIII—New Operations

This Article authorizes the registrant to estimate anticipated mileage for the upcoming license year if no mileage history exists because "new operations" are contemplated.

The registrant ". . . shall determine the in-jurisdiction and total mileage to be used . . ." but the base jurisdiction Commissioner is authorized to ". . . adjust the estimate . . . if . . . not satisfied with its correctness." Early drafts of the IRP provided that adjustments made by the Commissioner ". . . shall not increase the registrant's total proportional factor above 100%." This limitation on the Commissioner's authority was removed by deleting the reference to it on the ground that the base jurisdiction ". . . may at times be compelled to increase the registration to over 100% on adjustment of proportional estimate" due to statutory mandate. (See page 7-8, Minutes of the AAMVA Ad Hoc Committee Meeting held in Phoenix, Arizona, July 24-25, 1973.)]

Initial application for proportional registration shall state the mileage data in all jurisdictions for the preceding year with respect to such vehicle or vehicles. If no operations were conducted with such vehicle or vehicles

during the preceding year, the application shall contain a full statement of the proposed method of operation and estimates of annual mileage in each of the jurisdictions. The registrant shall determine the in-jurisdiction and total mileage to be used in computing the proportional registration fee for the vehicle or vehicles. The base jurisdiction Commissioner may adjust the estimate in the application if the base jurisdiction Commissioner is not satisfied with its correctness.

IX—Registration of Owner-Operator Vehicles

[This Article sets forth procedures specifically and solely applicable to vehicles leased by owner-operators to motor carriers on a long-term basis. The Plan does not define the terms "long-term" or "owner-operator." *As used in this article, these terms are construed to mean:*

Long Term—Any period of time exceeding 29 consecutive days.

Owner-Operator—An equipment lessor who leases his vehicular equipment with a driver to a for hire carrier pursuant to ICC regulations (49 CFR 1057) or similar regulations of a jurisdiction's regulatory body.]

A. Proportional registration for owner-operators who lease their vehicles to motor carriers on a long term basis shall be accomplished as follows:

1. The lessee shall be the registrant and the vehicle shall be registered by the carrier, but in both the owner-operator's name and that of the carrier as lessee, with the allocations of fees according to the records of the carrier.

2. The identification plates and cab card shall be the property of the lessee.

[*Under this section, the lessee-carrier is the owner of the identification plates and registration (cab) cards and, consequently, is responsible for their surrender under Article VII.A.*]

3. Should an owner-operator leave the fleet of the lessee, the lessee may proceed in accordance with Article VII.

[*This section authorizes the lessee-carrier to apply for a refund or credit under Article VII.A. if the vehicle will not be replaced by another, or to obtain new vehicle indicia for the replacement vehicle pursuant to Article VII.B. Under the provisions of the Plan the owner-operator is unable to obtain a refund directly from the member jurisdictions.*]

B. Vehicles of owner-operators that are not proportionally registered or not fully registered in a jurisdiction having a separate reciprocity agreement with the jurisdiction in which the vehicle is being operated shall be subject to the trip permit requirement as set forth in Article XII.

C. Each jurisdiction shall provide means of registration for owner-operators not operating as a lessor. Such registration shall be a restricted plate or permit issued for a minimum fee and for a registered gross weight not in excess of the empty weight of the vehicle.

[*This section requires each jurisdiction to develop a method by which an owner-operator can move his empty vehicle from one lessee-carrier fleet to another without violating general registration statutes, thereby avoiding unwarranted statutory penalties which might otherwise apply.* (See Article II.C.3. and V.D.)]

X—Trip Leasing

[This article provides special procedures applicable to "trip leasing" not to be confused with trip permit

registration, covered under Article XII. *"Trip Lease" is not defined in the Plan, but is construed to mean:*

> *A lease of vehicular equipment to a common or contract carrier (lessee) for a single movement by either (a) another common or contract carrier for transportation in the direction of a point which the lessor carrier is authorized to serve or (b) a carrier of exempt commodities, as defined in the Interstate Commerce Act, for transportation in the general direction of the general area in which the vehicle is based. The term may also include a similar movement intrastate where such movement is authorized under the laws of the jurisdiction.*

This provision was originally recommended for inclusion by the household goods carrier at the February 1972 Tampa Bay, Florida meeting to facilitate procedures for handling trip leasing in interstate commerce under ICC regulations with the primary registration responsibility placed on the lessee carrier. During the September 1972 Kentucky Dam Village meeting, the last sentence was modified to clarify that the service representative (see Article II.C.) has the same responsibilities. The major revision to this Article occurred at the AAMVA Ad Hoc Committee meeting held in Washington, D.C., May 30-31, 1973, when the registration and reporting burden was shifted from the lessee to the lessor in trip leasing situations involving two apportioned fleet operators. (See Minutes, page 4.) This revision recognized trip leasing practice, under which, in the vast majority of cases, the lessor is responsible for operational costs incurred under the lease.

Under a trip lease between an apportioned carrier and a non-apportioned carrier when a trip permit is not required, the miles so operated shall accrue

to the lessee carrier; if a trip permit is required, no miles will accrue to the lessee carrier.]

The lessee, except as provided for service representatives in Article II.C., is responsible for the proper registration of the vehicle. Except that an apportioned operator may lease equipment to another apportioned fleet operator and the lessor shall be responsible for reporting on the proportional application the miles traveled by the leased equipment. The lessee shall be the person using and operating the equipment by the lease agreement. The leased vehicle must bear proportional credentials and be operated only in the jurisdictions to which fees have been paid or a trip permit will be required. The service representative in Article II.C. shall have the same responsibility for qualifying his vehicles.

XI—Registration of Rental Vehicles

[This article sets forth procedures specifically and solely applicable to persons or firms engaged in the business of renting and/or leasing fleets of vehicles without drivers. A "rental fleet" must be designated as such by the "rental owner" and must include five or more "rental vehicles."

The intention of the IRP drafters in the adoption of this article was to allow, but not require, the owner of a rental fleet to be the "registrant" (see Article II.M.) of such fleet vehicles whether rented or leased. The Minutes (page 6) of the IRP Signators Meeting held in St. Louis, Missouri, October 15-16, 1973, indicate as follows:

> The next subject discussed concerned the proportional registration of rental fleets. In general, all vehicles that are leased by a registrant shall be proportionally registered in the name of the carrier. However, it was agreed that in the case of vehicles that are part of a rental

fleet, such vehicles *may be* proportionally registered in the name of the rental company as part of the rental fleet even though such vehicles may be under long term lease to an individual apportioned carrier. In such cases, the cab card may show to whom the vehicle is leased. (Emphasis added.)]

A. Definitions applicable to this Article are:

1. "Rental Owner" means an owner principally engaged, with respect to one or more rental fleets, in renting to others or offering for rental the vehicles of such fleets, without drivers.

2 "Rental Fleet" means five or more vehicles which are rented or offered for rental without drivers, and which are designated by a rental owner as a rental fleet.

3. "Rental Vehicle" means a vehicle of a rental fleet.

4. "Renting and Leasing" means the giving of possession and control of a vehicle for valuable consideration for a specific period of time.

[This section defines "renting and leasing" synonymously, making no reference to time limitations. Early drafts defined "renting" to mean "the giving of possession of a vehicle for consideration for a period 364 consecutive days or less." Because the 364 day limitation would unduly limit the registrant's fleet flexibility, that requirement was deleted. The definition was amended further to add the term "and leasing" following the term "renting," eliminating any distinction between the two terms for registration purposes under Article XI. (See pages 6-7, Minutes of the AAMVA Ad Hoc Committee Meeting held in Washington, D.C., May 30-31, 1973; see also page 32, Minutes of the 39th Annual International Conference held in New York, New York, September 19-23, 1971—attached to those minutes is a resolution recognizing the need for special treatment of "rental fleets" to ". . . achieve reciprocity among jurisdictions needed for service to the public and for efficient operation of rental vehicles.")]

5. "A Rental Transaction" for the rental of a vehicle shall be deemed to occur in the jurisdiction where such vehicle first comes into possession of the user.

B. Rental fleets owned by any person or firm engaging in the business of renting such vehicle, shall be extended full interstate and intrastate privileges, provided that:

[*A "rental owner" of a "rental fleet" in the business of "renting" and/or "leasing" apportionable vehicles without drivers in two or more member jurisdictions may register such vehicles in his own name.*]

1. Such vehicles are part of a rental fleet which are identifiable as being a part of such fleet; and

2. Such person or firm has received approval from the jurisdiction to apportion such rental fleet; and

3. Such person or firm registers the vehicles as described below:

a. Trucks and Truck-Tractors. In accordance with Articles III, IV, V, VI and VII of this agreement.

[*Trucks and truck-tractors not otherwise under this section* (see Article XI.B.3.e) *may be registered in the name of any person or firm engaged in the business of renting or leasing rental vehicles which are part of a rental fleet. These vehicles are subject to apportionment pursuant to the definition in Article II.B. and are to be registered in accordance with basic Plan procedures, as distinguished from procedures set forth in Article XI.B.3.e.*]

b. Rental Passenger Cars. Divide the gross revenue received in the preceding year for use of such rental vehicles arising from passenger car rental transactions occurring in the jurisdiction by the total gross revenue received in the preceding year for the use of such rental vehicles arising from passenger car rental transactions occurring in all jurisdictions in which such vehicles are operated. The resulting percentage shall be applied to the total number of passenger cars in the fleet and that figure shall be the number of rental passenger cars that shall be fully registered in the jurisdiction.

[This section requires the use of revenue, rather than miles, in determination of the quotient to be used in registering rental passenger cars. This revenue quotient approach was agreed by the drafters to be the only feasible method of determining the total number of rental passenger cars to be fully registered in each jurisdiction. Note that revenue is attributable to a jurisdiction if it arises from "rental transactions occurring in the jurisdiction." (Deemed to be where the vehicle first comes into possesion of the user; see Article XI.A.5.)]

c. Trailers and Semi-Trailers. Trailers and semi-trailers not in separate pool fleets and used in normal tractor trailer operations shall be licensed according to Article IV.C. Where required, trailers and semi-trailers, over 6,000 pounds gross vehicle weight and used solely in pool fleets shall be licensed as follows:

Divide the gross revenue received in the preceding year for the use of such rental vehicles arising from rental transactions occurring in the jurisdiction by the total gross revenue received in the preceding year for the use of such rental vehicles arising from rental transactions in all jurisdictions. The resulting percentage shall be applied to the number of units in such fleet.

[*Paragraph one requires that trailers and semi-trailers operating in rental fleets of trucks and truck*

tractors be registered in accordance with Article IV.C. (see Article XI.B.3.a.). *These vehicles, therefore, may be registered in the name of the rental owner, under basic Plan procedures.*

Paragraph two requires the use of revenue figures in the determination of the number of "pool" trailers or semi-trailers to be fully licensed. This provision fails to indicate that the application of the percentage factor to total fleet units determines the number of vehicles to be "fully registered" (see Article XI.B.3.b.) *or "fully plated"* (see Article XI.B.3.e).]

d. Utility Trailers. Utility Trailers, 6,000 pounds gross vehicle weight and under, every owner of utility trailers engaged in the business of renting such trailers for use in a jurisdiction shall register a number of trailers equal to the average number of such trailers rented in or through the jurisdiction during the preceding year.

[This section provides for the registration of utility trailers, which are trailers not exceeding 6,000# GVW. The Plan provides that the number of trailers to be registered shall equal the "average number of such trailers rented in or through the jurisdiction during the preceding year." This method of registration was selected because it was currently being used by most jurisdictions and, after careful consideration, was determined to be the most equitable and feasible approach.]

e. One-Way vehicle. Trucks of less than 26,000 pounds gross vehicle weight operated as a part of an identifiable one-way fleet will allocate vehicles to the respective jurisdictions based on the mileage factor procedure in Article III and fully plate said allocated vehicles in such jurisdiction. All trucks of such one-way fleet so qualified will be allowed to perform both interstate and intrastate movements in all jurisdictions.

[Provides for "vehicle allocation" of vehicles described as "one way vehicles." Such vehicles are those which are rented in one place and generally left in another. Such vehicles are to be "allocated" to each "respective jurisdiction."

In this section, an "allocated vehicle" is one to which a particular jurisdiction's basic registration plate is attached upon payment of that jurisdiction's full basic registration fee. A portion of each fleet of one way vehicles is "allocated" to each jurisdiction into or through which the fleet travels (each vehicle of the fleet need not enter every jurisdiction.) The mileage quotient procedure of Article III.A.1. is used to determine the number of vehicles allocated to each jurisdiction.

For example: Assume (1) Fleet A consisted of fifty vehicles; (2) the fleet traveled 1,000,000 total miles during the preceding year in ten jurisdictions; (3) 100,000 of those miles were traveled in jurisdiction X. Based on these assumptions, 10% of the fleet mileage was accrued in X and, consequently, five vehicles (10% x 50) should be allocated to and "fully plated" in X.

All trucks of an identifiable one way fleet (identified by visible markings) "so qualified" (allocated and fully plated) are to be authorized to perform both interstate and intrastate movements in IRP jurisdictions, even those identified with the registration plate of a non-IRP jurisdiction.]

XII—Trip Permit Registration

A. Trip permit registration may be issued for any vehicle or combination of vehicles which could be lawfully operated in the jurisdiction if full registration or proportional registration were obtained.

[*This section authorized the issuance of "trip permits" in lieu of either "full" or "proportional" registration. It is clear that the drafters' intent was to provide for an optional alternative, available to the registrant at his elecion.*]

B. A person desiring a trip permit registration shall make application therefore on forms provided by the Commissioner. Every such application shall be accompanied by the required fee. Every trip permit shall be carried in the cab of the vehicle for which such permit is issued.

C. Any vehicle or combination of vehicles for which a trip permit has been issued may be operated in interstate or intrastate commerce in the jurisdiction for the period allowed under such permit.

[This section sets forth a fundamental Plan concept that vehicles operating under trip permit ". . . may be operated in interstate or intrastate commerce in the jurisdiction for the period allowed under such permit." The minutes (page 8) of the AAMVA Ad Hoc Committee meeting held in Phoenix, July 24-25, 1973 indicate:

> The intention in the original document was to give the trip permit the same standing as a full proportional registration. Many times the trip permits allow only interstate movement, and if prorated it would allow both interstate and intrastate movement.

This section is construed to mean:

> *Any vehicle or combination of vehicles for which a trip permit has been issued may be operated interstate or intrastate in the jurisdiction for the period allowed under such permit.*

The drafters recognized that they should concern themselves with interstate and intrastate "move-

ments" only (whether such movements are in interstate or intrastate commerce is a regulatory issue: see Articles V.B., XI.B., XI.B.3.e. and XVII.E. and commentary thereunder).

The terms "interstate" and "intrastate" are not defined in the Plan, but are construed to mean:

Interstate—Vehicle movement between or through two or more jurisdictions.

Intrastate—Vehicle movement from one point within a jurisdiction to another point within the same jurisdiction.

Miles operated by an apportioned carrier under a trip shall accrue to the carrier.]

D. Trip permits shall not be used to evade or circumvent this agreement.

E. Jurisdictions, members to this agreement, may provide a system of issuing trip permits for other jurisdictions, members of this agreement, so that vehicles may move without waiting for telegraphic or other emergency authorization. The issuing jurisdiction shall collect the necessary trip permit fee and forward it to the jurisdiction for which the permit was issued and deliver to the registrant the permit for movement in the other jurisdiction or jurisdictions.

XIII—Preservation of Records and Audit

A. Any registrant whose application for proportional registration has been accepted shall preserve the records on which it is based for a period of the three preceding years. Such records shall be made available to the Commissioner at this request for audit as to accuracy of computation, payments, and assessments for deficiencies or allowances for credits, during the normal business hours of the day.

[This section requires the preservation of "operational records" supporting the application for a period of the ". . . . three preceding years." "*Preceding year" means the "twelve consecutive months immediately prior to July 1st of the year immediately preceding the commencement of the registration or license year for which proportional registration is sought.*" (See Article II.J.) *Records must be maintained through July of the fourth prior year for each registration year in question since the "preceding year" or mileage year actually includes part of two calendar years.*

Insofar as the Uniform Operational Audit Procedure Guidelines approved by the IRP jurisdictions (as amended 1981) set forth procedures applicable to the preservation of records sufficient for a determination of true liability, they are hereby incorporated by reference.]

B. If any registrant fails to make records available to the Commissioner upon proper request or if any registrant fails to maintain records from which his true liability may be determined, the Commissioner may, thirty days after written demand for an availability of records or notification of insufficient records, impose an assessment of liability based on the Commissioner's estimate of the true liability of such registrant as determined from information furnished by the registrant, information gathered by the Commissioner at his own instance, information available to the Commissioner concerning operations by similar registrants and such other pertinent information as may be available to the Commissioner.

XIV—Audits

[*Insofar as the Uniform Operational Audit Procedure Guidelines approved by the IRP jurisdictions (as amended 1981) set forth procedures required*

under audit, they are hereby incorporated by reference.]

A.1. The base jurisdiction shall audit the registrants displaying a base plate of the base jurisdiction as to authenticity of mileage figures derived from operational records and registrations and at such time and frequency as determined by the base jurisdiction.

2. In the event that the registrant's operational records are not located in the base jurisdiction and it becomes necessary for the base jurisdiction to send auditors to the place where such records are normally kept, the base jurisdiction may require the registrant to reimburse the base jurisdiction for per diem and travel expense of its auditors incurred in the performance of such audit.

B. Upon completion of any such audit, the Commissioner shall notify all jurisdictions in which the registrant was proportionally registered on the accuracy of the records of such registrant. Should the registrant have miscalculated the fees due any jurisdiction in which his vehicles were proportionally registered, such information shall be furnished to the jurisdictions for adjustment.

C. Audits may be made by the Commissioners of the several jurisdictions.

XV—Assessment Claims Under Audit

[*Insofar as the Uniform Operational Audit Procedure guidelines approved by the IRP jurisdictions (as amended 1981) set forth procedures required for assessment for deficiencies and claims for credit or refund, they are hereby incorporated by reference.*]

A. Upon audit, the Commissioner shall assess for any deficiency found to be due. No assessment for deficiency or claim for credit may be made for any period for which records are no longer required.

B. Assessments based on audit, interest on assessments, refunds, or credits or any other amounts including auditor's per diem and travel shall be made in accordance with the statute of each jurisdiction involved with the audit of a registrant.

XVI—Entry and Withdrawal

A. Any jurisdiction may become a party to this agreement by executing the prescribed adopting resolution and sending it to the American Association of Motor Vehicle Administrators (hereinafter referred to as AAMVA) in Washington, D.C.; however, such resolution must be approved and endorsed by all member jurisdictions using procedures contained in Article XIX.

B. This agreement shall continue in full force and effect, after its original adoption, as to each jurisdiction until cancelled or revoked by proper officials of any jurisdiction upon thirty days written notice to AAMVA who shall immediately notify the officials of the other member jurisdictions of this agreement. However, cancellation by one jurisdiction shall not effect the agreement as between other jurisdictions. All credentials issued under this agreement shall be valid until the end of the current registration year of the applicable jurisdiction.

XVII—Exceptions

A. Each signatory jurisdiction to this agreement shall list its exceptions, if any. These exceptions will be made a part of the adopting resolution and of this agreement by appendix listing and will be effective upon approval by each member jurisdiction using procedures contained in Article XIX.

B. Any jurisdiction may amend its exceptions by serving copies of the proposed changes on AAMVA and all member jurisdictions. Upon approval of all contracting jurisdictions, the amended or proposed exception shall

be effective in the next succeeding registration year provided at least 30 days notice has been given.

C. The withdrawal or cancellation of an exception shall be accomplished by filing due notice of such action with AAMVA and becomes effective upon notification to all member jurisdictions using the procedures contained in Article XIX. The withdrawal or cancellation of an exception shall not require approval by the member jurisdictions.

D. There shall be no exceptions taken, however, to the following concepts embodied in this agreement:

1. Single registration plate;

2. Single registration (cab) card; and

3. Ability to perform both interstate and intrastate vehicle movements.

XVIII—Other Agreements

[The IRP supersedes all other agreements between members ". . . covering, in whole or in part, any of the matters covered by the agreement." From the provision it is clear that agreements relating to matters not specifically covered by the IRP continue in force and effect. For example, any agreement granting full reciprocity (no fees for licensing) to vehicles not apportionable under the Plan would continue in effect (for purposes of this commentary an "agreement" is deemed to include "arrangements" and "understandings"; see commentary under Article II.B.).]

This agreement shall supersede any reciprocal or other agreement, arrangement or understanding between any two or more of the member jurisdictions covering, in whole or in part, any of the matters covered by this agreement; but this agreement shall not affect any reciprocal or other agreement, arrangement or understanding between a member jurisdiction and any non-member jurisdiction.

XIX—Administration

A. The AAMVA shall be the official repository of this agreement and shall be responsible for the required duties attendant to the administration of this agreement.

B. When two or more jurisdictions become signatories to this agreement, and as each jurisdiction thereafter joins the agreement, each jurisdiction shall send the prescribed adopting resolution to AAMVA in Washington, D.C. Upon receipt of such resolution, AAMVA shall provide a copy to each member jurisdiction for the purpose of obtaining the required endorsement. Each member jurisdiction shall notify AAMVA as to its endorsement or rejection of the applicant jurisdiction.

C. The AAMVA shall keep all jurisdictions apprised of the current status of the agreement in the manner determined by the Association to best accomplish this purpose.

D. Decisions regarding interpretations of any question at issue or formal policy procedures relating to this agreement shall be reached by agreement of three-fourths of the member jurisdictions, acting through the Commissioners thereof, and upon determination shall be placed in writing and be retained by AAMVA as a part of the permanent records which shall be binding on member jurisdictions where not in conflict with existing statute. Each such matter to be decided under this section shall be placed in writing and shall be presented to each member jurisdiction Commissioner for approval or rejection.

E. All issues requiring approval, or agreement, of the member jurisdictions shall be determined by ballot mailed by the repository, by certified mail return receipt requested, to each member jurisdiction. Entry into the

Plan, defined in Article XVI, and exceptions to the Plan, defined in Article XVII, require approval and endorsement by all member jurisdictions. On all other issues failure on the part of a member jurisdiction to respond to any ballot on matters pertaining to interpretations and amendments as set forth in Articles XIX(D) and XX of the IRP within 120 days of its receipt shall be deemed as approval by that jurisdiction.

XX—Amendments

This agreement may be amended, subject to the approval of three-fourths of the member jurisdictions, acting through the officials thereof authorized to enter this agreement. All proposed amendments shall be in writing and have been presented in one or more open meetings of Commissioners. Such proposed amendment must be accompanied by a memorandum setting forth the intent and purpose of the proposed amendment which memorandum shall be filed by the repository along with the amendment.

XXI—Effective Date

This agreement shall become effective upon the approval by any two jurisdictions and shall be operative between jurisdictions upon their signing or adopting this agreement.

XXII—AAMVA

The American Association of Motor Vehicle Administrators, AAMVA, hereby accepts the responsibilities herein above assigned to it.

By: _____
Executive Director, AAMVA

Signed this the _____ day of _____, 19— by the following jurisdictions, acting through their authorized officers:

APPENDIX A

RESOLUTION ADOPTING THE INTERNATIONAL REGISTRATION PLAN

WHEREAS, the International Registration Plan was formed to provide a uniform system for the registration of vehicles used interjurisdictionally, and

WHEREAS, it is the purpose of the Plan to implement the concept of one registration plate and one registration (cab) card for one vehicle;

NOW THEREFORE, in consideration of the mutual and reciprocal benefits to flow therefrom in accordance with the laws of this jurisdiction, the _____

_____
(Title of the Official)

acting in pursuant to _____
(Insert statutory authority)

and on behalf of the State/Province of _____, does hereby ratify the INTERNATIONAL REGISTRATION PLAN with no exceptions—exceptions as attached hereto. (Strike out the phrase that does not apply)

IN TESTIMONY WHEREOF, the State/Province of _____, acting through its duly authorized officials, has caused this resolution to be adopted to make the State/Province of _____, a member of and a party to the agreement herein mentioned, subject to the endorsement by all jurisdictions now party to the agreement.

Adopted this _____ day of _____, 19——.
FOR the State/Province of _____

BY: _____ _____
Signature Title

ENDORSEMENT: For the State/Province of ————

As required by Section A of Article XVI of the International Plan, this Resolution of Ratification is hereby endorsed on this ———— day of ————, 19————.

BY: ———————— ————————

Signature Title

APPENDIX B

ROSTER OF MEMBER JURISDICTIONS

Jurisdiction	*Date Signed*	*Date of Entry*
Kentucky	September 13, 1973	September 13, 1973
Tennessee	September 13, 1973	September 13, 1973
Missouri	September 13, 1973	September 13, 1973
Texas	September 13, 1973	September 13, 1973
Minnesota	September 13, 1973	January 1, 1975
Oregon	September 13, 1973	January 1, 1975
Nebraska	September 13, 1973	January 1, 1975
Utah	September 13, 1973	January 1, 1975
Colorado	September 13, 1973	January 1, 1975
Alberta	July 22, 1974	January 1, 1975
South Dakota	August 5, 1974	January 1, 1975
Mississippi	November 4, 1974	November 1, 1975
Virginia	February 24, 1975	March 1, 1975
Wyoming	July 14, 1975	January 1, 1976
Montana	October 10, 1975	January 1, 1976
Arkansas	October 10, 1975	July 1, 1976
Louisiana	December 1, 1975	April 1, 1976
Idaho	December 10, 1975	January 1, 1976
Illinois	July 7, 1976	January 1, 1977
North Carolina	July 16, 1976	January 1, 1977
Oklahoma	January 19, 1977	January 1, 1978
Wisconsin	May 23, 1977	January 1, 1978
Iowa	August 17, 1977	January 1, 1978
Alabama	September 5, 1979	October 1, 1980
Arizona	May 9, 1980	January 1, 1981
North Dakota	June 19, 1980	January 1, 1981
Kansas	July 9, 1980	January 1, 1981
Pennsylvania	Application Pending	

APPENDIX C

EXCEPTIONS TO THE INTERNATIONAL REGISTRATION PLAN

ALBERTA

Vehicles operating on the highways of Alberta without being proportionally registered as required by this agreement or temporarily registered with Alberta permits will be required to pay the full Alberta Motor Vehicle Registration fees plus any applicable penalties.

ARIZONA

Pursuant to Article XVII, and in accordance with Article IV, Section C and Article XI, Section B, Paragraph 3c, the State of Arizona files the following exception relating to trailers and semitrailers:

For registration purposes, trailers and semitrailers, including pool fleet trailers and semitrailers apportioned pursuant to Article XI, Section B, Paragraph 3c, are apportionable vehicles as defined in Article II, Section B, of the Agreement, and must be properly registered with the State of Arizona before operation on the highways in Arizona. Apportioned trailers and semitrailers must be properly identified by means of an appropriate plate and an apportioned cab card issued by the base jurisdiction. The fees shall be computed by using the factor determined in the same manner as prescribed for other apportionable vehicles.

COLORADO

Colorado requires the registration of trailers, semitrailers and auxiliary axles as provided in Colorado Revised Statutes 1973, Title 42, Chapter 3, Article 102.

NOTE: This does not mean that Colorado requires such vehicles to display a license plate in this state

if the base state does not issue a license plate or register such vehicles. We want (*sic*) the base state to include these vehicles on the applications submitted to Colorado.

IDAHO

Pursuant to Article VII, the State of Idaho files the following exceptions:

A) There are no credits for replacement vehicles; plates are not transferable (statutory).

B) If vehicle is destroyed, plates are transferable for a $5 fee.

C) The maximum fee charged on the power unit is $100, which is apportioned.

ILLINOIS

Pursuant to Article XVII, and in accordance with Article IV, Section C hereof, the State of Illinois herewith files the following exceptions:

All trailers are required to be prorationally registered prior to being operated on the highways of the State of Illinois. The fees for trailers shall be determined by applying the same apportionment factor as employed in Article III. Miles generated by trailers shall not be used in computing the Illinois apportionment factor. The applicant shall include a listing identifying all trailers with their proper vehicle identification number.

IOWA

Vehicles operating on the highways of Iowa, without being proportionally registered and operating under the

reciprocity extended by Chaper 326.23, Code of Iowa, 1975 ($10 72-hour trip permit) are limited to such operations and movements are exclusively interstate in character. Such vehicles operating intrastate will be subject to full Iowa registration fees as required by Chapter 321.54, Code of Iowa, 1975, or be proportionally registered.

KANSAS

1) Kansas will not proportionally register any motor vehicle not having a gross weight in excess of twelve thousand (12,000) pounds.

2) The requirement set forth in Article IX A.1. that registration be in both the name of lessee and lessor shall not apply to Kansas. Kansas will issue registration solely in the name of the lessee, the operating carrier. (This exception is not applicable to Article II Section C.3. of this Plan.)

3) "Apportionable Vehicle" as defined by Article IIB. includes trailers, semitrailers and auxiliary axles. Article IVC. allows member jurisdictions to waive apportionment of such vehicles. However, the same article provides that jurisdictions requiring proportional registration of such vehicles are to file an exception to the Plan. Kansas will not proportionally register trailers, semitrailers and auxiliary axles. Kansas feels the proper procedure to follow is for those jurisdictions not requiring proportional registration of such vehicles to file an exception to Article IIB. This position is contrary to Article IVC. which requires those jurisdictions requiring such registration to file the exception.

MONTANA

The State of Montana will require all trailers, semitrailers and all other trailing vehicles or combinations of trailing vehicles, except mobile equipment, be included in the fleet.

NEBRASKA

Vehicles operating on the highways of Nebraska, without being proportionally registered and operating under the reciprocity extended by the $10 72-hour Trip Permit are limited to such operations and movements as are exclusively interstate in character. Vehicles operating or moving between two points in Nebraska or carrying any merchandise or passengers between two points in Nebraska will be required to pay the full Nebraska Motor Vehicle Registration fees and taxes as required by R.S.S., NEBR 1943, Section 60-305.03, or be proportionally registered.

NORTH CAROLINA

Vehicles operating on the highways of North Carolina without being proportional registered as required by this agreement or temporarily registered with North Carolina permits will be required to pay the full North Carolina Motor Vehicle Registration fees plus any applicable penalties.

NORTH DAKOTA

1) Under Section II, paragraph E of the Plan, commissioner shall mean the North Dakota State Highway Commissioner.

2) Trailers and semitrailers are required to be registered pursuant to Sections 39-04-18 and 39-04-19, of the North Dakota Century Code.

3) Vehicles operating in the state by virtue of a trip permit $10 for 72 hours) are limited to interstate movements and operations.

OREGON

As provided in Article IV, Section C all trailers, semitrailers and auxiliary axles are required to be registered before they may be operated on the highways of the State of Oregon. The fees shall be computed by using the factor determined in the same manner as described by other apportionable vehicle.

The vehicles will be identified by means of an apportioned plate issued by the base jurisdiction in the same manner as any other apportionable vehicle.

Those jurisdictions that do not require identification plates for auxiliary axles may apply the fees to the trailer or semitrailer and withhold issuing any apportionment credentials.

As provided in Article IV, Section D.1., the applicant will include a listing identifying the power units, trailers, and semitrailers with the proper vehicle identification serial numbers and the license plate numbers issued by the base jurisdiction.

TEXAS

Vehicles operating on the highways of Texas without being proportionally registered as required by this agreement or temporarily registered with Texas 72-hour permits will be required to pay the full Texas Motor Vehicle Registration fees plus any applicable penalties.

VIRGINIA

Vehicles operating on the highways of Virginia without being proportionally registered as required by this agreement, or temporarily registered with Viginia 10-day permits, will be required to pay the full Virginia Motor Vehicle Registration fees plus any applicable penalties.

WYOMING

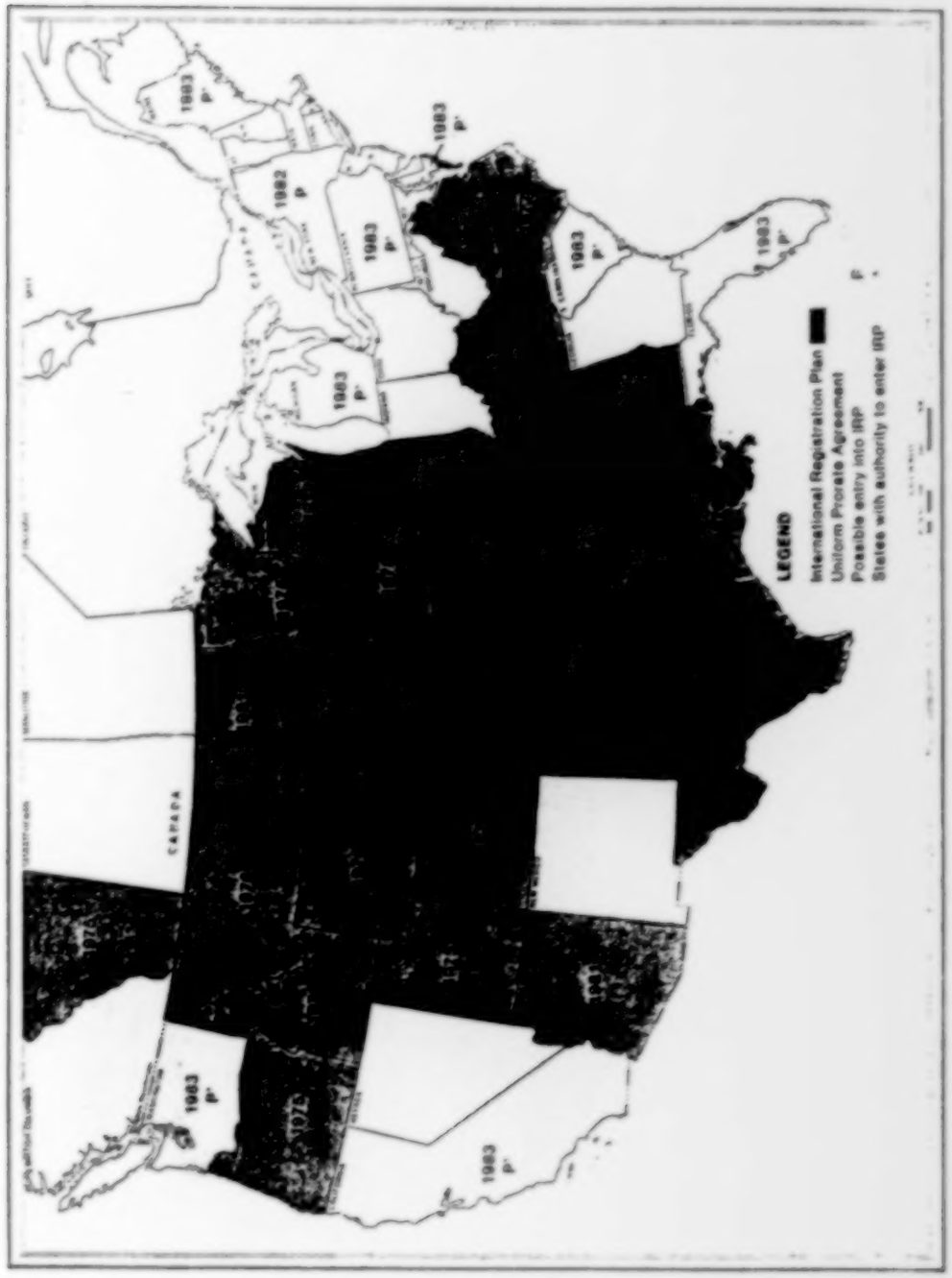
Pursuant to XVII of the International Registration Plan and in compliance with IV (C) thereof, the State of Wyoming requires that all trailers and semitrailers be registered for operation on the highways of the State of Wyoming. Registration fees are the same for trailers and semitrailers as for motor vehicles and are computed in the same manner.

Trailers and semitrailers for which the State of Wyoming is the base jurisdiction will each be issued an apportioned plate similar to those apportioned plates issued to motor vehicles. The State of Wyoming will honor trailer and semitrailer plates of other base jurisdictions issued as provided by their laws.

INTERNATIONAL REGISTRATION PLAN—Membership Status

APPENDIX D

MAP OF IRP STATES



PLAINTIFFS' EXHIBIT 52

ARKANSAS TOTAL HIGHWAY TAX COST
COMPARISON-TYPICAL TRUCK *
ARKANSAS-BASED TRUCK v. FOREIGN-BASED TRUCK **
1983

Tax Element	Cost per Mile: Arkansas Based	Cost per Mile: Foreign Based
Annual Vehicle Registration $1,044/70,000 miles	$0.0149	$0.0149
Fuel Tax 10.5¢/gallon 5.1 miles/gallon	0.0206	0.0206
Highway Use Equalization Tax	0.0089	0.0358
Plaintiff's Exhibits 45 and 46	——	——
Total Highway Tax Cost	$0.0444	$0.0713

* The "typical truck" used in this exhibit is more fully described in *Road User and Property Taxes on Selected Motor Vehicles*, Federal Highway Administration, 1982. Of particular interest here, the vehicle is a five-axle tractor-semi-trailer combination operating at a combined gross vehicle weight of 78,000 lbs. and traveling 70,000 miles annually.

** Foreign-Based, as used in this exhibit, refers to the majority of states which are members of the International Registration Plan and, therefore, pay identical registration fees to Arkansas for the privilege of highway use prior to the registration period. These states include Alabama, Arizona, Colorado, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin and Wyoming. In the remaining states, registration fees for this "typical vehicle" range from a low of $85.00 in New Mexico ($0.0012 per mile) to $1,175.90 in Vermont ($0.0168).

PLAINTIFFS' EXHIBIT 53

[SEAL]

U.S. Department
of Transportation

Federal Highway Administration

ROAD USER AND PROPERTY TAXES ON SELECTED MOTOR VEHICLES 1982

Highway Statistic Division/Office of Highway Planning

Drew Lewis
Secretary of Transportation

R.A. Barnhart
Federal Highway Administrator

For sale by the Superintendent of Documents,
U.S. Government Printing Office
Washington, D.C. 20402

INTRODUCTION

In this report, individual road-user tax payments are compared for each vehicle, and total direct State road-user and personal property taxes are measured. With this information, comparisons can be made among vehicles, among States, and among types of service. The tax rates in effect January 1, 1982, have been used, and the taxes that would be paid for a full year in each State are shown for each vehicle studied. The objective is the measurement of payments, and it is not the intent to assess the merits of the taxes imposed nor to indicate support for or opposition to any tax policy.

During the past 31 years, eight studies were published by the Federal Highway Commission that compared the magnitude of State highway-user taxes and property taxes on a selected group of vehicles. These studies in 1950, 1953, 1956, 1960, 1964, 1968, 1970, and 1973 provided reference points along the full range of vehicle sizes and use classes so that comparisons could be made among States on the effect of each of the taxes, as well as the yield from the entire group of taxes.

For those who have used the earlier studies, the similarity of subject matter and methods of presentation in this one should be helpful. Some of the vehicles selected for this study differ slightly from those used in earlier studies. This selection reflects recognition of changes in usage and legislation governing vehicle registration, classifications, and weights.

As in the prior studies, the vehicles chosen as examples and the operating factors applying to them are considered to be representative of the kinds and sizes of vehicles generally in operation throughout the United States. The assumed amounts and condition of their use are believed to be reasonable; however, they are not claimed to be average. They were selected, rather, to show given points in the tax structures of the States. No consideration was

given to the concentration of vehicles in various groups, a factor that will be of importance in applying the findings of this study.

The principal portion of current State road-user revenues is derived from the motor-fuel tax and from registration fees on motor vehicles. The need to generate additional revenues to provide for the increased costs of highway maintenance and construction has resulted in increased tax rates for gasoline in 35 States and diesel fuel in 33 States since 1975. Registration fees increased for automobiles in 21 States, for trucks in 26 States, for buses in 18 States, and for motorcycles in 25 States since 1975.

In an attempt to more equitably distribute the highway-user tax burden, three States adjusted the automobile registration fee and two States the truck fee since 1975. In this same period, one State, each, decreased truck, bus, and motorcycle registration fees.

The establishment, by legislation, of the variable tax rate is a recent development in motor fuel taxation. Washington was the first State to establish this type of tax rate in 1978 based on the price of motor fuel. Since then Indiana, Kentucky, Massachusetts, New Mexico, and Rhode Island have established a variable tax rate, also based on the price of motor fuel, and the District of Columbia established this type of tax rate based on the Consumer Price Index. Three other States have established a variable tax rate in addition to a basic cents-per-gallon rate. They are Nebraska, with the variable portion based on price of motor fuel; Ohio, with the variable portion based on motor fuel consumption and highway maintenance costs; and Pennsylvania, with the variable portion based on highway petroleum product sales.

A study of the taxation of motor vehicles inevitably reveals some anomalies in the tax structures of the States. In some instances, these are the result of gaps

or oversight in legislation. In others, they may have resulted either from a definite purpose or from developments not anticipated when the legislation was enacted. The most notable of course, was the adaptation of the diesel engine for highway vehicles and its use for years in many States without being subject to motor-fuel taxation. Now, all States except Vermont and Wyoming tax diesel fuel used on the highways. Vermont imposes registration fees on diesel-powered vehicles that are 75 percent greater than the registration fees for gasoline-powered vehicles, while Wyoming imposes a compensatory tax on diesel-powered vehicles that is greater than the tax on gasoline-powered vehicles. There is also no fuel tax shown on tables for diesel-powered vehicles in Idaho and Oregon. This does not mean that there is no tax charge, but rather that the manner of collection is through a special schedule of mileage taxes that contain an "in lieu" fuel tax portion.

The methods used and assumptions made in processing the data should be studied carefully to avoid misunderstanding. The methods and assumptions are shown in the "Specifications, Use Factors and Method of Presentation" section of this report.

THE TYPICAL VEHICLES

The bases for registering motor vehicles vary considerably among the States. The most common basis for registering passenger cars is the flat fee, as shown in table 2, but there are several groupings and variations, e.g., Mississippi determines its levy by compounding a fixed fee and tax components based upon gross weight and vehicle age. Trucks and vehicle combinations are registered in 35 of the States on a gross vehicle weight basis, but among the remainder of the States there are many variations in the classification and taxation of trucks and combinations. The bases for registering trucks are given in table 3. Table 4 shows the basis for register-

ing a common carrier bus in intercity, intrastate service. The most common basis is gross weight; empty weight and seating capacity bases are also widely used. A flat rate is applied in four States, and in others combinations of these factors plus additional bases, including age, horsepower, and number of axles, are used. Motorcycles are registered on a flat fee basis in all but four States. In Hawaii and New York, motorcycles are registered according to weight, in South Dakota they are registered on the basis of engine displacement, and in Iowa they are registered on the basis of age.

The determination of whether data from any State for any given vehicle would be included or excluded from the study was based primarily on whether the vehicle, as specified, would be registered and permitted to operate in that State. In some States the vehicle or combination could be registered but could not be operated legally with a full load. All such vehicles were omitted from the study, even though they could be registered and might sometimes be operated on the highways of the State with slightly lower gross weights. Where minor variances of axle spacing would permit a vehicle to be used legally in a State, it was assumed for study purposes that the vehicle so altered was essentially the same as that described in the specification sheet and could be reasonably compared with the vehicle of the same description from other States. Consideration was given to any allowance permitted by law relating to scale accuracy or enforcement tolerances.

A direct comparison between the two heaviest truck combinations is not possible due primarily to the increase in weights since the earlier study. The trend toward heavier vehicles and the increase in number of States permitting these vehicle combinations, however, is readily apparent from a comparison of data between the two studies. The 1973 study showed that both of the vehicle types were permitted in 17 States. The 1982 study shows that these vehicle types (No. 12 and No. 13) are permitted in 30 States even though the current vehicle specifications show an increase in gross weight.

Both vehicle types are now allowed in five States where neither was before: Florida, Iowa, Minnesota, New York, and Wisconsin. In 1973, only the tractor-semitrailer, full trailer combination was permitted in Indiana, Kansas, Kentucky, Maryland, North Dakota, Oklahoma, South Dakota, and Texas. In 1982 both are permitted.

The status of the two largest truck combinations (No. 12 and No. 13) is shown geographically in figure 5.

Tractor-semitrailer combinations are registered as single units in 40 of the States; in 7 States and the District of Columbia, tractor trucks and semitrailers are registered as separate units; and in 3 States, they may be registered as single units or separately. In this study, combinations are considered to be registered as single units in those States where the fee for either the tractor or the semitrailer is based on the gross weight or capacity of the combination, even though in most of these States a relatively small fee is also levied on the other unit of the combination. In the three States in which the owner has the option of registering his combination as a single unit or as separate units, it has been assumed that the owner would choose the method that would result in the lowest registration fee. The States were asked to rate the vehicles as they are customarily requested by the owners, thus, Montana showed combinations registered as separate units while Delaware and Washington showed combinations registered as single units.

Fifteen vehicles were selected to illustrate the range and magnitude of State taxes on motor vehicles: three passenger cars, five single-unit trucks, five vehicle combinations, a bus, and a motorcycle.

Their relative sizes and axle arrangements are shown in silhouette inside the front cover. The vehicles selected are in general use and are sufficiently similar to vehicles

selected for the preceding studies to permit comparisons. The user is reminded that the basic purpose of the study is to present a series that permits comparison of the tax scales of the States at several points, rather than to present common or average vehicles. Description of the vehicles follows:

Passenger Vehicles:

No. 1—A lightweight sedan.

No. 2—A mediumweight sedan.

No. 3—A heavyweight sedan.

No. 14—A 47-seat, diesel-powered, intercity bus.

No. 15—A motorcycle.

Single-Unit Trucks:

No. 4—A gasoline-powered pickup truck registered for 5,000 pounds gross weight.

No. 5—A gasoline-powered stake truck registered for 14,000 pounds gross weight.

No. 6—A gasoline-powered van truck registered for 24,000 pounds gross weight.

No. 7—A diesel-powered van truck registered for 24,000 pounds gross weight.

No. 8—A tandem-axle diesel-powered dump truck registered for 50,000 pounds gross weight.

Vehicle Combinations:

No. 9—A three-axle, tractor-semitrailer, gasoline-powered, registered for 40,000 pounds gross weight.

No. 10—A four-axle, tractor-semitrailer (tandem axles on the semitrailer), diesel-powered, registered for 60,000 pounds gross weight.

No. 11—A five-axle, tractor-semitrailer (tandem axles on both units), diesel-powered, registered for 78,000 pounds gross weight.

No. 12—A five-axle combination consisting of a two-axle diesel-powered tractor-truck, a single-axle semitrailer, and a two-axle full trailer, registered for 80,000 pounds gross weight.

No. 13—A five-axle combination consisting of a three-axle diesel-powered truck and a two-axle full trailer registered for 80,000 pounds gross weight.

The automobiles for this study were selected to be comparable in weight to those used in the previous study. This was done to reflect the high and low rates in the State taxation structures for many of the 20 States and the District of Columbia that base their registration fees on weight, to aid in comparison of like-sized vehicles between the two studies and to reflect the total automobile fleet mix rather than the mix for the 1980 model year.

A major development since the previous study has been the decrease in size, weight, and horsepower of the automobiles produced and sold. The primary causes of this trend are federally mandated fuel economy standards and the public's desire for more fuel efficient automobiles in the face of rising fuel costs. Care should be taken to make allowances for this development when using the figures in this study, particularly the registration fee and motor-fuel tax figures.

Another development since the previous study has been the increase in the maximum vehicle weights permitted in a number of States, increased use of heavier trucks, and the increased use of diesel engines in the lighter-weight trucks. Consequently, the gross weights of the combination trucks over 40,000 pounds have been increased and a 24,000 pound diesel-powered truck has been included. The 55,000-pound four-axle tractor-semitrailer

combination has been increased to 60,000 pounds, the 72,000-pound five-axle tractor-semitrailer combination has been increased to 78,000 pounds, and both the five-axle tractor-semitrailer and full trailer combinations have been increased from 72,000 pounds and 76,000 pounds, respectively, to 80,000 pounds. The 55,000-pound gasoline-powered four-axle tractor-semitrailer has been dropped.

To compare taxes on vehicles that differ primarily in the fuel used, data have been included on two types of 24,000 pound van trucks (Nos. 6 and 7). One type has a gasoline engine and the other a diesel engine. An arbitrary assumption, but one considered reasonable, was made of a fuel consumption rate of 5.9 miles per gallon for the gasoline vehicle and of 6.9 miles per gallon for the diesel vehicle.

Nine States impose a higher tax on diesel fuel than on gasoline. These States, and the tax rates in cents per gallon as of January 1, 1982 are as follows:

State	Gasoline	Diesel
Alabama	11	12
Arkansas	9.5	10.5
Iowa	13	13.5
Kansas	8	10
Mississippi	9	10
Montana	9	11
New York	8	10
Tennessee	9	12
Texas	5	6.5

TABLE I - DATA USED IN COMPUTING STATE ROAD USER AND PERSONAL PROPERTY TAXES ON SELECTED VEHICLES

1982 REGISTRATION YEAR

SHEET 2 OF 2

FACTORS AFFECTING TAXATION	TRACTOR-SEMITRAILER COMBINATION CONT.				TRACTOR-SEMITRAILER AND FULL TRAILER			TRUCK-FULL TRAILER		BUS	MOTORCYCLE
	NO. 10 (2-S2) (DIESEL)		NO. 11 (3-S2) (DIESEL)		NO. 12 (2-S1-2) (DIESEL)			NO. 13 (3-2) (DIESEL)		NO. 14 (DIESEL) INTERCITY	NO. 15
	TRACTOR-TRUCK	SEMITRAILER	TRACTOR-TRUCK	SEMITRAILER	TRACTOR-TRUCK	SEMITRAILER	FULL TRAILER	TRUCK	FULL TRAILER		
Body Type	Tractor	Van 40'	Tractor	Van 40'	Tractor	Van 27'	Van 27'	Tank Truck	Tank Trailer	47 Seat	-
Price F.O.B. Factory (1980)	$28,992	$13,925	$ 46,592	$13,925	$ 40,719	$ 9,250	$13,050	$ 65,535	$ [illegible],356	$106,000	$1,040
Horsepower, Max. Brake	-	-	-	-	-	-	-	-	-	275	-
Horsepower, Net	210	-	290	-	283	-	-	270	-	-	-
No. of Cylinders	6	-	6	-	8	-	-	6	-	8	2
Displacement cc.	-	-	-	-	-	-	-	-	-	-	395
Weight:											
Empty Weight lb.	10,171	11,110	15,752	11,110	12,601	6,717	9,997	17,679	7,110	26,900	370 (Dry)
Load Weight lb.	17,829	20,690	30,248	20,690	19,399	11,283	20,003	22,322	32,890	9,500	330
Gross Vehicle Weight lb.	28,000	32,000	46,000	32,000	32,000	18,000	30,000	40,000	40,000	36,400	700
Gross Weight of Combination lb.	60,000	-	79,000	-	80,000	-	-	80,000	-	-	-
Length:											
Wheelbase in.	136	-	143	-	119		-	226	-	285	54.7
Distance between Tandem Axles in.	-	48	49.6	48	-	-	-	51.5	-	48.3	-
Length of Combination ft.	50	-	50	-	65	-	-	63.75	-	40 (Bus)	-
Tires:											
Size	11R22.5	11R22.5	10R20	11R22.5	11R24.5	10R20	10R20	11R22.5	11R22.5	12.5R22.5	Front 3.60X19 Rear 4.10X18
Arrangement: Front	Single	-	Single	-	Single	-	Dual	Single	Dual	Single	-
Rear	Dual	Dual-Tandem	Dual-Tandem	Dual-Tandem	Dual	Dual	Dual	Dual-Tandem	Dual	Dual & Single Tandem	-
Total Annual Miles Traveled:											
Personal Use	-	-	-	-	-	-	-	-	-	-	-
Private Operation	50,000	-	70,000	-	80,000	-	-	80,000	-	-	2,700
Contract Carrier	60,000	-	70,000	-	80,000	-	-	80,000	-	1/ 87,500	-
Farm Service	-	-	-	-	-	-	-	-	-	-	-
Average Miles Per Gallon:											
Personal Use	-	-	-	-	-	-	-	-	-	-	-
Private Operation	5.8	-	4.8	-	4.7	-	-	4.7	-	-	57
Contract Carrier	5.8	-	4.8	-	4.7	-	-	4.7	-	-	-
Farm Service	-	-	-	-	-	-	-	-	-	1/ 5.9	-
										-	-
Annual Motor Fuel Consumption:											
Personal Use gal.	-	-	-	-	-	-	-	-	-	-	-
Private Operation gal.	8,621	-	14,583	-	17,021	-	-	17,021	-	-	19
Contract Carrier gal.	10,345	-	14,583	-	17,021	-	-	17,021	-	-	-
Farm Service gal.	-	-	-	-	-	-	-	-	-	1/ 14,831	-
Total Property Ton-Mile (Avg. Load.)	691,130	-	1,094,705	-	1,[illegible]80	-	-	1,[illegible],430	-	-	-
Average Gross Weight lb.	[illegible],537	-	[illegible],653	-	[illegible],414	-	-	[illegible],[illegible]	-	[illegible],400	-
Gross Annual Earnings	$21,600	-	$ 114,410	-	$ 114,[illegible]9	-	-	$ 141,[illegible]	-	1/ [illegible],[illegible]	-

1/ In contract carrier service (Class I).

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PLAINTIFFS' EXHIBIT 56

ARKANSAS TOTAL TAX COST
COMPARISON-TYPICAL TRUCK *
ARKANSAS-BASED TRUCK v. FOREIGN-BASED TRUCK **
1983

Tax Element	Cost per Mile	
	Arkansas Based	Foreign Based
Annual Vehicle Registration		
$1,044 x 19,386/70,000=289.13 $1,044 x 2,389/70,000 = 35.63	$0.0149	$0.0149
Fuel Tax	0.0206	0.0206
10.5¢/gallon 5.1 miles/gallon		
Highway Use Equalization Tax	0.0089	0.0358
Plaintiff's Exhibit 45 and 46	——	——
Total Highway Tax Cost	0.0444	$0.0713

* The "typical truck" used in this exhibit is more fully described in *Road User and Property Taxes on Selected Motor Vehicles*, Federal Highway Administration, 1982. Of particular interest here, the vehicle is a five-axle tractor-semi-trailer combination operating at a combined gross vehicle weight of 78,000 lbs. and traveling 70,000 miles annually.

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PLAINTIFFS' EXHIBIT 3

Arkansas State Highway and Transportation Department
Research for the Robertson Conferring Arkansas-Based HUE Taxpayers
Revised ATA Survey Information 1 of 2

HUE

IRP Account No.	Taxpayer / Owner	Tax Method $.05	Tax Method $175.00	Number of Heavy Trucks	Tax Cost	IRP Report Arkansas Mileage	IRP Cost Per Mile	Interstate/NL User Reported AR Mileage	Interstate User Cost Per Mile	Survey Cost Per Mile	Tax Cost on Survey	Mileage on Survey
3744	A&H Enterprises		✓	45	$ 7875.00	3283469	$ .0240	4000010	$ .0190	$ .0229	$ 71775.00	3285846
4412	A&H Truck Line Inc		✓	67	11725.00	11801774	.0099	1164162	.0091	.0091	117250.00	12909779
1553	Allen Canning Co		✓	7	1225.00	2676012	.0046			.0080	5850.00	1483288
5245	Allen Canning Co		✓	41	7175.00	2142557	.0066	4751179	.0125	.0246	94725.00	7142287
24000	Allen Trucking Co		✓	2	1225.00	3499751	.0035				1750.00	1171731
3334	Ark-Ida Feed Co		✓	7	1225.00	2213123	.0055				11225.00	2271323
3045	Arkansas Lumber Co-op Inc		✓	57	9975.00	2797075	.0036	2194225	.0051	.0051	4675.00	2884225
1733	Atlas Pecan Co		✓	7	1225.00	2311069	.0053	3035552	.0054	.0053	12225.00	2311069
WIP 5346	Bates Carpets											
3119	Bateman Farms Organ		✓	20	3500.00	4391696	.0080	4477983	.0078	.0098	3500.00	4314976
WIP 2742	Batesville Truck Comp											
4678	Benton Veneer Co		✓	1	175.00	1942299	.0090			.0091	175.00	2155516
1229	Bibb Brothers		✓	6	1050.00	4461332	.0024			.0119	13200.00	7500000
7779	Big Piney Lumber Co, The		✓	5	875.00	1187601	.0007			.0060	875.00	1946200
WIP 4015	Bill Black Black Trailer											
21103	Bobcat Inc		✓	5	875.00	3964197	.0022			.0085	2775.00	3146357
4418	Bobby Henson		✓	2	350.00	6143520	.0057			.0057	350.00	6145614
251	Bodcaw Inc		✓	40	7000.00	3980226	.0176			.0176	70000.00	3978014
WIP 4198	Brown Trucking Inc											
Not Listed	Buffalo Trucking ML											
4509	Builders Supply Co		✓	3	525.00	8491210	.0062			.0062	525.00	8491210
5216	Bunley Barnett		✓									
WIP 1052	C & L Trucking											
4687	Calvin Fyler		✓	1	175.00	2800000	.0062			.0057	1750.00	3071429
3331	Cargill Incorporated		✓	13	2275.00	1594919	.0117			.0143	2275.00	1594919
6281	Charles Ketchel		✓	1	175.00	5000000	.0035			.0044	1750.00	4000000
WIP 1363	Chesley A Myers											
Not Listed	Chrysler Body Plt ML											
Not Listed	Cities Service Co ML											
No 331 Renewal	Clarke & Jackson Inc ML		✓									
4776-A	Class 7th Bldg of S. Ark		✓	1	175.00	4650000	.0038			.0038	7000.00	8000000
WIP 4838	" " "											
WIP 4791	" " Co											
Not Listed	Coleman Canning Co ML											
1626	Columbia Grain Corp		✓	8	1400.00	7993222	.0030	9189412	.0017	.0098	5950.00	7999322
5350	Coller Oil Co		✓	1	175.00	1094040	.0017			.0029	1750.00	6030000
3514	Crystal Oil Co		✓	18	3150.00	5087971	.0036	5211438	.0060	.0060	3150.00	5211438
2157	D D C Enterprises		✓	1	175.00	1354710	.0130			.0259	1750.00	675050
Not Listed	Dalley Hibbard ML											
WIP 4350	Daily Lumber Co											
				295	$ 52150.00	7353502	.0070	1458771			507225.00	2837973

Enclosed

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Arkansas State Highway and Transportation Department
Research for Hwy Retention Rulemaking Re Based IRUE Taxpayers
Revised ATA Survey Information

2 of 2

	IRP Account No.	Taxpayer / Owner	Tax Method $.05	Tax Method $175.00	Number of Heavy Trucks	Tax Cost	ERP Reported Arkansas Mileage	IRP Cost Per Mile	Survey Cost Per Mile	Tax Cost on Survey	Mileage on Survey
1	605	Dale Rogers Trucking		✓	1	$ 175.00	31760	$ .0551	$ .0551	$ 175.00	31760
2	Not Listed	Dana Setzer Trucking									
3	Not Listed	Darrell D. Clyde Flora									
4	3681	David Davidson Trucking		✓	1	175.00	142693	.01220	.00123	175.00	142693
5	111A	Delp Inc		✓	26	4550.00	2654467	.01719	.01689	4726.00	2797699
6	6492	Delta Farms & Inc.		✓	1	175.00	313556	.00556	.00056	175.00	313556
7	WIP 4629	Eagle Creek Farms									
8	Not Listed	Ed Dame Jr Trucking									
9	WIP 11858	Elmus Burton									
10	Not Listed	Elven R. Lukkerson									
11	6859	Ems Trucking		✓	4	700.00	1400490	.00050	.00050	700.00	14000980
12	WIP 1509	Floyd Ammon									
13	WIP 2271	Forrest Dabbs									
14	WIP 2k	Frank Combs									
15	Not Listed	Hank Thompson Transport									
16	5680	Hart Enterprises		✓	1	175.00	40113	.04436	.04436	175.00	40111
17	WIP 2452	Franklin Hay									
18	2577	G Ray Baker Trucking		✓	10	1750.00	5997999	.00044	.00044	1750.00	39778998
19	Not Listed	Garland Ridgell Sand									
20	WIP 2509	Gary Quisby									
21	Not Listed	Gary Reed									
22	WIP 2812	Glen Nelson									
23	5116B	Grover & Ruth Knapp		✓	1	175.00	21300	.00812	.00812	175.00	21300
24	1183	Gulf Supply Co		✓	1	175.00	1182558	.00074	.00074	175.00	1182558
25	5892	Harlan's Trucking		✓	5	164.15	32897	.00500	.00500	164.15	32897
26	5417	Harvard Building Co.		✓	5	175.00	1104425	.00099	.00099	1104.25	1104425
27	WIP 3764	Hope Agr Products		✓							
28	114	Hope Rock Crushing		✓	3	5.25	23944	.00223	.00111	52.50	27432
29	12000	J & J Trucking		✓	1	1.48	16960	.00500	.00500	84.80	16960
30	42	J B Hunt		✓	504	88200.00	23822113	.00306	.00298	7350.00	2382113
31	2665	J B Buffy Hauling	Trailer Only								
32	WIP 12	J W Trucking Service									
33	4036	J. M. Watson		✓	2	350.00	40500	.00486	.00086	350.00	4050000
34	Not Listed	Jerry Stone									
35	11477	Joe W Smith		✓	1	175.00	500436	.00035	.00035	175.00	5008364
36	5339	John H Neal Inc		✓	15	2275.00	3100133	.00073	.00073	2275.00	31001333
37	Not Listed	Johnny Rose & Sons Logging									
38	2081	Jones Aggregate Delivery Hauling		✓	10	1750.00	1700035	.00092	.00092	1750.00	19000435
39		Jones Truck Lines		✓	422	73850.00	6921465	.01071	.00892	43350.00	6921465
40	Not Applied	K P L Trucking & Supply									
					1425	$ 177762.93	139246465	.01162		165037.45	11616496

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Arkansas State Highway and Transportation Department
Research for the Collection of Heavy AR Based IRUE Taxpayers
Revised ATA Survey Information

IRP Account No.	Taxpayer / Owner	Tax Method $.05	Tax Method $175.00	Number of Heavy Trucks	Tax Cost	IRP Apportioned AR Mileage	IRP Cost Per Mile	10	11	Survey Cost Per Mile	Tax Cost on Survey	Mileage on Survey
WP	Bonnell Wayne Mobile			7	1225.00	31894.46	.0038			.0038	1225.00	31894.46
	L E Cogdell Timber			2	350.00	8555.29	.0041			.0041	350.00	8555.29
	Load-O-Rama of AR			13	2275.00	26877.11	.0846			.0846	2275.00	26877.11
	Lucky Bowl Poultry Farms			1	175.00	6560.00	.0267			.0267	175.00	6560.00
	Mobley Trucking Co.			13	2275.00	19563.52	.1163			.0961	1685.00	17537.00
	Lawrence Tomato											
	Insurance Co of AR			4	1050.00	29414.59	.0356			.0086	1050.00	29414.59
WP	Lockhart Vance			1	175.00	6400.00	.0273			.0152	175.00	11512.00
	Ace Stevedoring Co											
	Louis Lipsey											
Not Located	Langley Inc											
Not Located	Dot Cline Trucking											
Not Located	Dave Star Co Inc											
WP	W & S Lumber Co Inc											
	Hudson Cedar Co.			3	525.00	4598.17	.1141			.0115	525.00	45817.00
	Mason Petroleum Inc.			4	700.00	5354.11	.1307			.0013	700.00	53541.00
	M.A. South Co			3	525.00	15442.16	.0340			.0004	525.00	154421.15
	M.C. Pearl											
	M.C. Vaughn											
WP	Miller Hardware Co.											
	Moore Distributing											
	Mobley			5	700.00	13217.00	.0529			.0054	700.00	13217.00
	National Bank			4	525.00	24183.00	.0217			.0021	525.00	24183.00
	National Ark Paper Co			10	1050.00	35933.39	.0292			.0029	1050.00	36203.13
	Northcott Transport Co			10	1750.00	24284.41	.0720			.0072	1750.00	24284.41
WP	D.W. Smith Lumber			3	525.00	20978.78	.0250			.0025	525.00	20978.78
	P.A.M. Transport Inc.											
WP	Ralph Equipment Co.			31	5425.00	44170.00	.1228			.0123	5425.00	44170.00
No	Russell Clark Drilling											
	Ralph Sanders Oil Co Inc											
	Wallace Grain											
	Rice Exports											
WP	Portland Farm			1	175.00	16179.00	.0108			.0125	175.00	14000.00
Not Located	Rob Taylor Stave Co			11	1925.00	39444.00	.0488			.0223	1925.00	86345.00
	Ed Young Logging											
	Roman Pine Inc.			2	350.00	7777.00	.0450			.0050	350.00	70000.00
	Ray Neely			2	350.00	4500.00	.0778			.0078	350.00	45000.00
	Eastbrook Farms											
	Randall Corp			1	175.00	19724.00	.0089			.0086	175.00	20000.00
	Hollis Trucking			2	350.00	40743.00	.0086			.0086	350.00	40743.00
				24	4550.00	134616.55	.0338			.0223	4550.00	134616.55
				177	34475.00	616.5202					34475.00	1127.6400

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Illinois State Highway Transportation Operations and Research for the Illinois Toll Highway Authority and the Illinois Tollway Revised ATA Survey Information 4 of 5

IRP Account No	Taxpayer Name	Tax 4.05	Method 175.00	Number of Heavy Trucks	Tax Cost	IRP reported NR Mileage	IRP Cost Per Mile	10	11	Survey Cost per Mile	Tax Cost or Survey	Mileage or Survey	14
WP	Robert R Kellogg												
	Roberts Bros Trucking Co.												
	Roberts Oil Co Inc.												
	Rogers Lumber Co												
	Russell Hauling												
	Russellville Steel Co.												
	Sanders Trucking												
	Schaefer Hauling												
	Schroeder Trucking												
	Schultz Grain Farms												
	Schwartz Bros Trucking												
WP	Scott Trucking												
	Service Transport Inc												
	Skaggs Trucking Co												
	Slone Trucking Inc												
	Smith Oil Co												
WP	Smith Trucking												
WP	Snyder Trucking												
WP	Sparks Trucking												
WP	Stanley Trucking												
WP	Steele Trucking												
WP	Stevens Trucking												
WP	Stewart Trucking												
WP	Stone Trucking												
WP	Sullivan Trucking												
WP	Swanson Trucking												
WP	Taylor Trucking												
WP	Thompson Trucking												
WP	Tucker Trucking												
WP	Turner Trucking												
WP	Vaughn Trucking												

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Revised AIA Survey Information

3 of 5

IRP Aircraft No	Taxpayer	Owner	Tax Method		Number of Heavy Trucks	IRP Tax Cost	IRP Apportioned AR Mileage	IRP Cost Per Mile			Survey Cost Per Mile	Tax Cost on Survey	Mileage on Survey
			$ 05	$ 175.00									

PLAINTIFFS' EXHIBIT 40

check can compare this report!

Byrd-6

-- FINAL REPORT --
ARKANSAS FOREIGN-BASED HUE TAXPAYERS
HIGHWAY USE OPERATING CHARACTERISTICS
BASE PERIOD: 1982

Per Cents. 58.4576 : 1181 = .0445

TAX PAYMENT METHOD

	5¢ / mile		$175 / truck		Totals
Number of Carriers	920	+	261		1,181
Number of Trucks	72,215	+	14,189		86,404
Truck Miles in Arkansas	97,929,898	+	108,461,265	=	206,391,163
AR Truck Miles/Truck	1,356		7,644		2,389
HUE Tax Expense	$4,896,494.90	+	$2,483,075.00	=	$7,379,569.90
Hue Tax Expense/Mile	$0.0500		$0.0229		$0.0358

CARRIERS	57748	A	4,986
	$6,710,305.30		$6,056,575.00
TRUCKS	115,208		34,608

PX-40

$175 method

261 + 14189 + 9654 = 24043

97929898 / 1356 / $4,896,494.90

108,461,265 + 66,680,900 = 174,142,165 = 9972

$2,483,075.00 / 33,608 = $73.89

A/B = x/C A·C = B·x A·C/B = x

94,058 # Trucks

272,172,143 Miles

2892 AR Miles/Truck

$6,719,019.90 HUE Exp

.0320 $/Mile

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DEFENDANTS' EXHIBIT 2

COUNSELTRANS INC.

COSTS AND SAVINGS ASSOCIATED WITH CHANGES IN WEIGHT LIMITS ON ARKANSAS HIGHWAYS

STATEMENT BY RALPH D. JOHNSON
PRESIDENT, COUNSELTRANS INC.

October 14, 1982

CounselTrans Inc.
6110 Executive Boulevard, Suite 120
Rockville, Maryland 20852

• • • •

[827] INTRODUCTION

The objectives of this study are to determine the impacts on the highway improvement program in Arkansas and on interstate and intrastate transportation costs that would result from increased truck weight limits in Arkansas. Arkansas now allows gross load limits of 73,280 pounds and axle loads of 18,000 pounds for single axles and 32,000 pounds for tandem axles. Impacts are evaluated for an increase of those limits to 80,000 pounds gross vehicle weight, 20,000 pound single axle load and 34,000 pound tandem axle load.

An increase in vehicle load limits in Arkansas can be expected to decrease truck trips currently travelling in or through Arkansas as more payload will be carried per truck. Trip savings will also mean savings in vehicle miles of travel and operating costs for the trucking industry. On the other hand, there will be some additional truck traffic attracted to Arkansas as a result of the ability to shorten distances for interstate freight movements now bypassing Arkansas in trucks loaded to the 80,000 pound GVW level accepted in all but 3 states. As this study shows, the combination of trip reductions on current trips originating in, destined to or entirely travelling in Arkansas and new trip attractions does produce a net increase of trips on most interstate highways. There are net reductions on other facilities, however.

There also will be some impacts of the heavier loadings on Arkansas' highways. Where the increase in vehicle limits results in heavier and or more frequent axle load applications than originally anticipated, pavement lives will be shortened to some degree. Some bridges that are currently adequate to handle existing loadings may be reclassified as deficient with heavier weight limits.

This study makes a factual analysis of both the savings in transportation costs and the additional costs on

the various highway systems that may be expected to result from the changes in the weight limits. The impacts are determined as a result of updated outputs from an interstate commodity flow transport model developed by CounselTrans and previously utilized in three studies of national scope, two performed for and accepted by the Federal Highway Administration.[1] It has also been employed in a regional study. The model identifies truck movements on intercity arterial highway links throughout the [828] country. It identifies these flows in the trucks in which they occur by truck type and load characteristics including gross vehicle loads, net commodity loads carried, and axle loadings imposed on the highways.

Impacts to the highway system are evaluated using generally the same basic highway design methodology employed by the Arkansas State Highway and Transportation Department (SHTD) and related pavement performance formulas. Detailed pavement design information was obtained from the SHTD for a random sample of 20 percent of the state's Interstate System mileage and typical designs on primary and secondary highways. Detailed information was also obtained on the latest bridge inventory as well as relevant traffic information. Principals of the SHTD were extremely cooperative in providing access to all of these data from the agency's files.

It should be noted that bridge impacts are based on the assumption that legislation permitting the new gross and axle weights will incorporate controls relevant to what is known as bridge formula B.

---

[1] 1. State Laws and Regulations on Truck Size and Weight, Transportation Research Board, NCHRP Report 198; 2. Investigation of High-Volume Heavy Truck Intercity Freight Corridors, FHWA; 3. Estimates of Potential Fuel Savings in Barrier States, FHWA.

[829] SUMMARY FINDINGS

1. Transportation cost savings resulting from changes in GVW limits from 73,280 pounds and axle load limits from 18,000 to 20,000 pounds for single axles and 32,000 pounds to 34,000 pounds for tandem axles will total $115.8 million in the representative change year.[1] These savings accrue as follows:
   (1) For vehicles originating in Arkansas: $53.1 million
   (2) For vehicles originating outside Arkansas: $62.7 million
2. Commensurate increases in highway pavement costs of any and all kinds are as follows:
   (1) Federal Aid Interstate Highways: 7.15%
   (2) Other State Primary Highways: 7.44%
   (3) State and County Secondary Highways: 4.00%
3. Increases in structures (bridge) costs are conservatively estimated to be as follows, provided the legislative changes also make provision for incorporation of bridge formula B:
   (1) All State Highway Bridges: 1.82%
   (2) All County Highway Bridges: 2.17%
4. Total highway program cost increases are estimated to be as follows:
   (1) State Program Costs: 4.0%
   (2) County Program Costs: 1.2%
   (3) Municipal Program Costs: 0%

[1] For comparison purposes, to avoid the uncertainties of projection, all savings and costs were estimated as if they occurred in 1982.

5. For comparison with transportation cost savings, actual monetary costs on highways in the change year is dependent on the level of highway program undertaken:
   (1) At an ideal level, if the R. J. Hansen improvement and maintenance program were undertaken as recommended in 1978, which would result in an expenditure of $920.4 million in 1982 for all units of government in Arkansas, the commensurate costs associated with the increases in legal limits would be $26.1 million.[2] Added to the annual program cost this gives a figure of $946.5 million.

[830]

   (2) At the current program level, with 1982 expenditures estimated to be in the neighborhood of $320 million, the additional program costs associated with increases in legal limits would be $8.4 million. Added to the program costs, this gives a figure of approximately $328 million.

Neither one of these increase figures provides an adequate basis for comparison with the $115.8 million savings in item 1 above. There is little doubt that the RJH figure, involving maximum program cost increases, is too high from the standpoint of what the state may realistically achieve in program increases. And it would be manifestly unfair to evaluate annual cost increases on the basis of cost levels which will not be achieved. On the other hand, the present program level is substantially below that needed even to hold the line against a continuing increase in highway surface deficiencies. The Arkansas legislature should give serious attention to significantly increasing available highway funds, distributing the costs among users in line with the R. J. Hansen highway cost allocation study.

[2] Expenditures on all systems in the state excluding Federal Aid.

Nevertheless, whatever is undertaken, it is obvious that transportation cost savings, ultimately reflected in everyone's pocketbook, justifies the cost of the weight increases many times over. This is true if only the direct savings to industries based in Arkansas are taken into consideration by themselves.

• • • •

[834] *Summary of Impacts of New Weight Limits on the Trucking Industry*

Increasing weight limits in Arkansas would result in savings in the first year of:

- 638,131 trips;
- 112.2 million vehicle miles of travel; and
- $115.8 million in transportation operating costs.

DEFENDANTS' EXHIBIT 11

AR	TX	OK	TOTAL
70,000	35,000	35,000	140,000 miles
.50000%	.25000%	.25000%	100%
$522.00	$200.90	$182.75	$904.75 total fee
70,000	100,000	50,000	220,000 miles
.31818%	.45455%	.22727%	100%
$332.18	$363.64	$166.13	$861.95 total fee
70,000	10,000	15,000	95,000 miles
.73654%	.10526%	.15789%	100%
$769.26	$84.21	$115.42	$968.89 fees

DEFENDANTS' EXHIBIT 14

COMPARISON OF ARKANSAS-BASED AND FOREIGN-BASED TRUCK LICENSE FEES

Arkansas Based Truck License Fees	Foreign Based Truck License Fees
$0.0260 License Fee/Mile	$0.0110 License Fee/Mile

SUPREME COURT OF THE UNITED STATES

No. 88-325

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*

ORDER ALLOWING CERTIORARI

Filed November 14, 1988

The petition herein for a writ of certiorari to the Supreme Court of Arkansas is granted. This case is consolidated with No. 88-192, *McKesson Corporation* v. *Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida, et al.*, and a total of one hour is alloted for oral argument.

November 14, 1988

Supreme Court, U.S.
FILED
JAN 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-325

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
RESPONDENTS

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether this Court's decision in *American Trucking Associations, Inc.* v. *Scheiner*, 107 S.Ct. 2829 (1987), which held that flat highway taxes violate the nondiscrimination principle of the Commerce Clause, should be applied retroactively to require refunds of the unconstitutionally exacted tax payments.

2. Whether, even if the decision in *Scheiner* is not retroactive, Arkansas was entitled to retain unconstitutional highway taxes for a tax year that did not begin until after *Scheiner* was decided.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Petitioners are certified plaintiff classes consisting of all motor carriers whose vehicles were "subject to the Highway Use Equalization Tax embodied in Act 685 of 1983," including the following named plaintiffs:

Petitioner American Trucking Associations, Inc. (ATA), is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Petitioner Arkansas Motor Carriers Association, Inc., formerly the Arkansas Bus & Truck Association, Inc., is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Petitioner Leon Cawood is a sole proprietor doing business as Leon Cawood Trucking.

Petitioner Commercial Carriers, Inc. is a wholly owned subsidiary of Ryder Commercial Transport, Inc., which in turn is a wholly owned subsidiary of Ryder System, Inc. Commercial Carriers' affiliates or subsidiaries (other than wholly owned subsidiaries) are Automotive Rail-handling, Inc.; B & C, Inc.; Blazer Truck Lines, Inc.; Carrier Support, Inc.; Complete Auto Transit, Inc.; Delevan Industries, Inc.; F. J. Boutell Driveaway Co., Inc.; Fleet Carrier Corporation; Fleet Carrier Dealer Services, Inc.; Janesville Auto Transportation Company; M & G Convoy, Inc.; Murray Sandblast & Paint, Inc.; National Trucking Company; Ryder Energy Distribution Corporation; Ryder Truck Rental, Inc.; Summit Industries, Inc.; and Transport Support, Inc.

Petitioner Diamond Transportation System, Inc., is an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are Fox Transportation, Inc.; Sed. Air, Inc.; and Snicknej Co.

Petitioner Joe Fortenberry is a sole proprietor doing business as Fernwood Transportation.

Petitioner Jones Truck Lines, Inc., which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of JTL Holding Company.

Petitioner Rollins Leasing Corporation is a wholly owned subsidiary of R.L.C. Corporation. Rollins' affiliates or subsidiaries (other than wholly owned subsidiaries) are Rollins Dedicated Carriage Services, Inc., and Rollins-Matlack Administrative Services, Inc.

Petitioner Transcon Lines, which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Transcon, Inc.

Respondents are the following defendant state officials, or their successors: Maurice Smith, Director, Arkansa. Highway and Transportation Department (Mr. Smith's predecessor in office, Henry C. Gray, was the lead defendant in the earlier proceedings in this case); Dalton Farmer, Ron Harrod, Patsy Lee Thomasson, Robert Pritchett, Jr., and Bobby Hopper, members of the Arkansas State Highway Commission; John Bailey, Chief of the Arkansas Highway Police Division of the Arkansas Highway and Transportation Department; Charles D. Ragland, Commissioner of Revenues, Revenue Division, Arkansas Department of Finance and Administration; Jimmie Lou Fischer, Treasurer of the State of Arkansas; and Mahlon Martin, Director, Arkansas Department of Finance and Administration. Intervenor-defendants O.K. Enterprises, Inc., Peterson Industries, Inc., and Pilgrim's Pride Corporation, doing business collectively as the Arkansas Poultry Federation, are additional respondents.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-325

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
RESPONDENTS

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (Pet. App. 1a-5a) is reported at 746 S.W.2d 377. The opinion of Justice Blackmun in his capacity as Circuit Justice with respect to interim injunctive relief (Pet. App. 9a-13a) is reported at 108 S.Ct. 2. The orders of the Supreme Court of Arkansas denying rehearing (Pet. App. 7a-8a), denying interim relief (*id.* at 14a), and denying a remand to Chancery Court for in-

terim relief (*id.* at 15a) are unreported. The order of this Court remanding the prior appeal to the Supreme Court of Arkansas (*id.* at 16a) is reported at 107 S.Ct. 3252.

JURISDICTION

The judgment of the Supreme Court of Arkansas was rendered on March 14, 1988, and a timely petition for rehearing was denied on April 25, 1988 (Pet. App. 7a). On July 20, 1988, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including August 23, 1988, and the petition was filed on that date. The petition was granted on November 14, 1988. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

STATEMENT

1. On June 23, 1987, this Court struck down two Pennsylvania flat highway use taxes as violative of the Commerce Clause of the United States Constitution. *American Trucking Associations, Inc.* v. *Scheiner*, 107 S.Ct. 2829. This case concerns the retroactive and prospective effect of the decision in *Scheiner* on an Arkansas tax materially indistinguishable from one of the invalid Pennsylvania taxes.

The Arkansas Highway Use Equalization (HUE) Tax, Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (Supp. 1985), enacted in 1983 and repealed in October 1987, required heavy trucks operating on Arkansas' highways to pay either an annual flat tax of $175 or a tax of 5¢ per mile traveled in Arkansas. The proceeds of this user fee were dedicated to maintenance of the State's highways.[1]

[1] Prior to 1983, while most states allowed trucks to operate at a weight of 80,000 pounds, Arkansas had enforced a lower 73,280-pound limit. This made it a "barrier" state and seriously impeded the flow of interstate commerce. In 1983, the State increased the legal weight limit to 80,000 pounds and imposed the HUE tax on these heavier trucks. The State's decision to increase truck weight limits was motivated not by the desire to facilitate interstate commerce but rather by the fear that its lower limit would result in a complete loss of federal highway monies. See Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 133(a), 96 Stat. 2123 (1983) (codified as amended at 23 U.S.C. § 127).

Under this scheme, Arkansas effectively taxed only the first 3,500 miles of annual highway use by a given vehicle—that being the point at which it became advantageous to pay the flat $175 rate. Any further highway use, though obviously causing additional highway wear and tear, was free of tax. The result of this tax structure was that frequent users of the State's highways paid a substantially lower tax per mile of operations than did less frequent users. Because vehicles based in Arkansas were likely to log many more miles within the State than vehicles based elsewhere, the tax produced a substantial discrimination against interstate commerce in terms of per-mile costs, as the court below acknowledged (Pet. App. 2a).

2. In 1983, even before the HUE tax became effective, petitioners instituted this class action challenging the tax on the ground that it impermissibly discriminated against interstate commerce in violation of the Commerce Clause. Petitioners promptly sought preliminary injunctive relief, which was denied by the Arkansas courts (see Pet. App. 39a-41a). Thereafter, the Chancery Court of Pulaski County upheld the tax, and a divided Arkansas Supreme Court affirmed (*id.* at 17a-35a, 36a-38a). An appeal was taken to this Court under 28 U.S.C. § 1257(2). The Court held that appeal (No. 87-358) pending its decision in the simultaneously filed appeal in *Scheiner* (No. 87-357), which involved an identical constitutional challenge to Pennsylvania's two flat highway use taxes.

On June 23, 1987, this Court ruled that the Pennsylvania taxes violated the Commerce Clause because their measure was not proportionate to the extent of highway

use. It noted that the "inevitable effect [of unapportioned flat taxes] is to threaten the free movement of commerce" (107 S.Ct. at 2840), that the Pennsylvania taxes failed the "internal consistency" test for determining the validity of state taxes challenged under the Commerce Clause (*ibid.*), and that "the taxes are plainly discriminatory" because "[i]n practical effect * * * they impose a cost per mile on [out-of-state] trucks that is [many times] as heavy as the cost per mile borne by local trucks" (*id.* at 2841).

On June 26, 1987, the Court vacated the judgment of the Arkansas Supreme Court in this case and remanded for further consideration in light of *Scheiner*. 107 S.Ct. 3252 (Pet. App. 16a). Petitioners immediately inquired of Arkansas officials whether they intended to continue to enforce the HUE tax during the pendency of the remand proceedings and were advised that they did. In addition, the State refused to allow the tax to be paid under protest and declared that, even if the HUE tax were to be held unconstitutional, it intended to assert a defense of sovereign immunity as a complete bar to any refunds. Pet. App. 12a. In light of the State's position, petitioners moved for immediate issuance of this Court's mandate in order to expedite their attempt to obtain injunctive relief against the HUE tax once the case returned to the Arkansas state courts. Over the State's opposition, Justice Blackmun granted petitioners' motion, and the mandate issued on July 16, 1987 (see Pet. App. 10a).

3. That same day, with the Arkansas Supreme Court soon to recess for the summer, petitioners moved in that court for a remand to the Chancery Court so that they could seek a preliminary injunction either to bar further collection of the HUE tax or to order an escrow of the taxes to be collected. In this application petitioners noted that the failure to act expeditiously would result in the collection of large sums of plainly unconstitutional taxes,

which the State had indicated it would under no circumstances refund. Notwithstanding the court's impending recess and the fact that July and August were peak months for the payment of HUE taxes (see pages 41-42 & n.27, *infra*), the State opposed the motion for a remand, and the Arkansas Supreme Court denied it on July 20, 1987 (Pet. App. 15a).

In light of that action, petitioners asked, on July 24, 1988, that the Arkansas Supreme Court itself grant injunctive relief in the form of an order requiring HUE tax payments to be escrowed pending a ruling on the constitutionality of the HUE tax. In support of the application, petitioners argued that the HUE tax was indistinguishable from the Pennsylvania axle tax invalidated in *Scheiner*. Petitioners further explained that out-of-state truckers operating in Arkansas risked irreparable injury in the absence of temporary equitable relief: if the truckers refused to pay the HUE tax pending a determination of its constitutionality, they would be barred from using the State's highways and would suffer devastating economic losses; if, on the other hand, they paid the HUE tax, there was a substantial risk, given the State's announced intent to assert sovereign immunity and its refusal to accept HUE tax payments made under protest, that they would be denied refunds once the tax was declared unconstitutional.

4. On July 30, 1987, the Arkansas Supreme Court entered an order (without opinion) denying petitioners' application for temporary relief (Pet. App. 14a). Petitioners thereupon immediately sought emergency injunctive relief from this Court. On August 14, 1987, Justice Blackmun, in his capacity as Circuit Justice, granted petitioners' application and ordered that all further HUE tax payments be placed in escrow pending completion of the litigation. 108 S.Ct. 2 (Pet. App. 13a). Justice

Blackmun found that the HUE tax "works to deter interstate commerce" in a manner "substantially similar to that of the Pennsylvania unapportioned flat taxes invalidated in *Scheiner*" and that "ATA is likely to succeed on the merits of its challenge to the Arkansas HUE tax" (*id.* at 11a). Justice Blackmun further concluded that there was a risk of irreparable injury to the carriers represented by ATA, in light of the State's refusal to accept HUE tax payments made under protest and its planned assertion of sovereign immunity as a ground for refusing refunds (*id.* at 12a).

5. In an opinion issued on March 14, 1988 (Pet. App. 1a-6a), the Arkansas Supreme Court decided the remand proceedings. It made short shrift of the question of the constitutionality of the HUE tax under *Scheiner*. Noting that "[i]t is conceded that the HUE tax effectively costs other truckers more per mile than it costs those based in Arkansas" (*id.* at 2a), the court struck down the statute, stating that it had "little doubt that the Supreme Court would hold that the HUE tax is unconstitutional" (*id.* at 3a).

Despite this conclusion that petitioners had been forced to pay an unconstitutional tax, the Arkansas Supreme Court denied refunds, holding that this Court's decision in *Scheiner* should not be applied retroactively under the test of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). The court concluded that the State had been justified in relying on this Court's old *Aero Mayflower* line of cases [2] in adopting and enforcing the flat HUE tax, that the Commerce Clause free trade policies that required the

[2] *Aero Mayflower Trans. Co.* v. *Georgia Pub. Serv. Comm'n*, 295 U.S. 285 (1935); *Aero Mayflower Trans. Co.* v. *R.R. Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950).

result in *Scheiner* would be fully served by prospective application of that ruling, and that retroactive application of the new rule would be inequitable because the unconstitutionally exacted tax revenues had already been expended and a full refund would exceed a fair recovery for the discrimination petitioners suffered. Pet. App. 4a-5a.[3]

In addition, despite its acknowledgment that the HUE tax was plainly unconstitutional under *Scheiner*, the Arkansas Supreme Court permitted the State to retain most of the monies collected for the right to operate on the State's highways during the July 1, 1987-June 30, 1988 tax year. Although that tax year did not even *begin* until after *Scheiner* had been decided, the court ordered refunds only of amounts collected after August 14 and placed in escrow under the compulsion of Justice Blackmun's order. It explained, inconsistently with its recognition of the controlling effect of *Scheiner*, that it was not until Justice Blackmun's escrow order that the State was "put on notice that the ATA's claims [of unconstitutionality] * * * were likely to succeed on their merits" (Pet. App. 5a). The court also observed (*ibid.*) that the escrowed funds had not been spent or, presumably, counted on for the future. Justice Hickman dissented from this part of the court's ruling, explaining that it erroneously failed to give full prospective effect to *Scheiner* (*id.* at 6a).

[3] The court did not explain why the latter observation made it equitable to refuse a refund of even the discriminatory portion of the tax. This point was stressed in ATA's rehearing petition to the Arkansas Supreme Court (at 4-8), which was denied without opinion.

SUMMARY OF ARGUMENT

In *American Trucking Associations, Inc.* v. *Scheiner*, 107 S.Ct. 2829 (1987), this Court held that flat highway taxes violate the Commerce Clause because they discriminate against highway users operating in interstate commerce. In light of *Scheiner*, it is uncontested that Arkansas violated petitioners' constitutional rights when it imposed the HUE tax in 1983. The Arkansas Supreme Court nonetheless held that the State was not required to remedy this constitutional violation by refunding the illegal exacations. Relying on *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the court below concluded that it would be unfair to the State to apply *Scheiner* "retroactively" to the tax refund proceedings and held that refunds would be required only of taxes paid after Justice Blackmun ordered creation of the escrow. The Arkansas Supreme Court's analysis is plainly wrong.

I.

A. The threshold requirement for nonretroactivity under *Chevron* is that the decision "establish a new principle of law" by "overruling clear past precedent on which litigants may have relied" (*Chevron*, 404 U.S. at 106). Only if the decision "announce[s] an entirely new and unanticipated principle of law" (*United States v. Johnson*, 457 U.S. 537, 551 (1982)), so that application of the new rule would upset legitimate and firmly established reliance interests, would it be appropriate for a court to ignore the new—and correct—legal rule in deciding a case.

Arkansas cannot satisfy that requirement, because this Court's decision in *Scheiner* did not announce any new principle of Commerce Clause jurisprudence. Instead, *Scheiner* merely applied settled principles governing state taxation of interstate commerce first articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977),

and reiterated in a number of cases decided prior to passage of the HUE tax. The Court expressly noted in *Scheiner* that flat highway taxes are "unquestionably discriminatory" (107 S.Ct. at 2847) and that they violate the Commerce Clause "[u]nder our consistent course of decisions in recent years" (*id.* at 2841).

This conclusion is not affected by the existence of the *Aero Mayflower* line of cases, which had upheld flat highway taxes nearly half a century earlier. Although the State in *Scheiner* had "talismanically" invoked the *Aero Mayflower* decisions to defend its flat taxes (107 S.Ct. at 2833), the Court quickly disposed of those decisions as relics of the pre-*Complete Auto* era resting on Commerce Clause principles that "our more recent decisions * * * have rejected" (*id.* at 2846). Accordingly, the Court noted, when *Complete Auto* eroded those archaic principles, "we necessarily called into question the future vitality of" the *Aero Mayflower* cases. *Ibid.*

In enacting the HUE tax in 1983, therefore, Arkansas could not justifiably have relied on *Aero Mayflower* and could have had no reasonable assurance that flat highway taxes were constitutional. In these circumstances, absolving the State of its obligation to refund the illegal taxes would be wholly at odds with this Court's refusal in *Owen* v. *City of Independence*, 445 U.S. 622 (1980), to allow governmental entities to assert a "good faith" defense to damages liability in constitutional cases.

B. Retroactive application of *Scheiner* would further the purposes behind the Commerce Clause rule announced in that case. By requiring refunds of the discriminatory taxes imposed on out-of-state truckers, it would rectify the competitive benefit granted in-state truckers and thus would help to return interstate commerce to "a plane of equality with local trade in local taxation." *Nippert* v. *City of Richmond*, 327 U.S. 416, 434 (1946). Equally significant, refunds would dampen the natural

incentive of state legislators to discriminate against interstate commerce. As recent experience has demonstrated, states often are motivated to enact constitutionally questionable taxes that favor in-state over out-of-state interests. These statutes are likely to proliferate if legislators know that such preferences would be not only politically advantageous but economically cost-free.

C. The balance of equities also strongly favors the retroactivity of *Scheiner*. Arkansas is simply being required to return taxes that it unconstitutionally collected. Particularly given the weakness of the State's reliance interests in imposing the HUE tax, that can hardly be considered a "substantial inequitable result[]" (*Chevron*, 404 U.S. at 107). Although the Arkansas Supreme Court apparently believed that refunds would impose a burden on the state highway system, it never considered any of the means suggested by petitioners—such as spreading repayment over a period of years or use of bonds—to ameliorate that burden. Indeed, because the payments can be funded by new, nondiscriminatory highway taxes, the State would merely serve as a conduit for rectifying the past discrimination.

It is immaterial to this inquiry that petitioners enjoyed the use of the State's highways during the period of the tax. The objection is not that petitioners were taxed—and, of course, they paid numerous other Arkansas highway taxes during the same period—but that they were discriminated against and thereby required to pay far more than their fair share. Surely, the Arkansas Supreme Court's concern that petitioners not receive an *excessive* refund, because of their past use of the highways, fails to explain why they should receive *no* refund at all.

II.

Even if *Scheiner* is not retroactive, there can be no justification for the Arkansas Supreme Court's further ruling that this Court's decision became effective in

Arkansas not when it was announced but rather when Justice Blackmun entered the interim escrow order nearly two months later. Since the invalidity of the HUE tax was apparent once *Scheiner* was decided, this part of the holding below amounts to nothing less than a refusal to give full *prospective* effect to *Scheiner* by allowing the State to continue to enforce a plainly unconstitutional flat highway tax. This result is all the more unjustified because it rewards Arkansas for its dilatory and obstructive tactics in refusing to recognize the controlling force of *Scheiner* and in delaying the adjudication of the constitutionality of the HUE tax following the remand from this Court. Accordingly, taxes collected for highway use during the post-*Scheiner* tax year, whether remitted before or after the decision was handed down, are subject to refund.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO RECOVER THE TAXES THAT *SCHEINER* HELD TO VIOLATE THE COMMERCE CLAUSE

It is a general principle of long standing that the rule of law announced by a judicial decision normally has retroactive effect. See, *e.g.*, *Saint Francis College* v. *Al-Khazraji*, 107 S.Ct. 2022, 2025 (1987); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). "[T]he general rule of retroactivity" (*Robinson* v. *Neil*, 409 U.S. 505, 507-508 (1973)) is well established, and "[t]he principle that * * * judicial decisions operate retrospectively * * * is familiar to every law student." *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982).

In a narrow range of circumstances, however, this Court has held that some decisions establishing "new" legal principles should not be applied retroactively to later cases in which the operative facts arose before the date of the decision setting forth the new rule. See

Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971).[4] We submit that this exception was never intended to cover the situation where a finding of retroactivity would require the government merely to pay monetary compensation to the victim of its unconstitutional conduct. That is particularly true where, as here, the remedy amounts to nothing more than restitution of the government's ill-gotten gains. "[W]here the plaintiffs seek * * * the refund of money that the state has unconstitutionally taken from them," the state "is only being asked to pay back money which the plaintiff claims it had no right to collect in the first place." Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations.* 69 Calif. L. Rev. 189, 309-310 (1981).[5]

Indeed, the Court has followed this approach in a situation essentially indistinguishable from the present case. In *Owen* v. *City of Independence*, 445 U.S. 622 (1980), a plaintiff injured as a result of the city's unconstitutional conduct sought compensatory damages un-

[4] The courts "construe this exception to retroactivity narrowly" (*Lund* v. *Shearson/Lehman/American Express, Inc.*, 852 F.2d 182, 184 (6th Cir. 1988)), limiting nonretroactivity to "exceptional cases" (*In re Disclosure of Grand Jury Material*, 821 F.2d 1290, 1293 n.3 (7th Cir. 1987)) and applying a "presumption * * * strongly in favor of retroactive application." *EEOC* v. *Vucitech*, 842 F.2d 936, 941-942 (7th Cir. 1988).

[5] The Court's *Chevron* decisions generally involve the retroactivity of statutory or procedural rulings in the context of civil litigation between private parties. In that context, the governing rules are essentially neutral in allocating the risk of loss, associated with a change in law, between the plaintiff and defendant. But the governing rules are not neutral in a case such as this. In the criminal area, where the relative interests of the litigants also are not evenly balanced, the Court has declined to apply the *Chevron* test. Instead, it has held that rules announced in criminal cases must be given retroactive effect even when they constitute a "clear break" with the past. See *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987).

der 42 U.S.C. § 1983. The court of appeals held that the city had violated the plaintiff's rights under the Fourteenth Amendment but that it was entitled to qualified immunity from damages liability because its officials acted in good faith. *Id.* at 633. This Court reversed. The Court noted "[h]ow 'uniquely amiss' it would be * * * if the government itself * * * were permitted to disavow liability for the injury it has begotten" and how unfair it would be if "many victims of municipal malfeasance would be left remediless" (*id.* at 651). As the Court observed, "[i]t hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. * * * Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Id.* at 654. Moreover (*id.* at 655),

> even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.

Thus, whatever the result might be where imposition of a newly-recognized legal rule would "visit substantial injustice and hardship upon" blameless private litigants (*Northern Pipeline Constr.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982)), there should be great reluctance to employ the *Chevron* test as a means of absolving the *government* from having to pay a *monetary award* designed simply to *compensate* a plaintiff for injuries suffered as a result of the violation of his *constitutional* rights. Whether the government "reasonabl[y] * * * conducted itself" (Pet. App. 3a) or not, the fact remains that its conduct violated the Constitution and caused demonstrable financial damage. *Chevron* speaks poorly if at all to that situation.

In any event, even if *Chevron* provides the applicable standard in this case, the Arkansas Supreme Court erred in holding that the State satisfied its stringent requirements for nonretroactivity. The Court in *Chevron* stated the test as follows (404 U.S. at 106-107 (citations omitted)):

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

We turn now to an application of this test.

A. The Ruling In *Scheiner* Did Not Constitute An Unforeseeable Break With Clear Past Precedent

1. *The threshold* Chevron *standard requires an unexpected and unforeseeable change in the law*

For a decision to have prospective-only effect, it first "must establish a new principle of law" (*Chevron*, 404 U.S. at 106). In cases like *Scheiner* that involve the continued vitality of earlier rulings, this requirement has been described to mean that the decision must "overrul[e] clear past precedent on which litigants may have relied" (*ibid.*).[6] As the Court has explained, this " 'clear

[6] It is debatable whether *Scheiner* involves an overruling or simply a limitation of past precedent (see 107 S.Ct. at 2847), but we think that question should be of little moment to the present inquiry

break' principle * * * [is a] threshold test for determining whether or not a decision should be applied nonretroactively." *United States* v. *Johnson*, 457 U.S. 537, 550 n.12 (1981). Because the decision in *Scheiner* fails to satisfy this threshold test, it should be applied to require payment of the refunds at issue in this case.

The reliance element of *Chevron* is designed to identify those instances in which retroactive application of a new legal principle would upset strongly justified expectations, for only then might the normally overriding societal interest in applying the correct rule of law be outweighed.[7] As explained in *Lemon* v. *Kurtzman*, 411 U.S. 192, 198 (1973) (*"Lemon II"*), retroactivity analysis involves "[t]he process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old * * *." See also *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295 (1970) (referring to the " 'justified reliance' necessary to warrant withholding retroactive application of a decision"); *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 498 n.13 (1968) (referring to "the sort of justifiable reliance which alone could generate a prospectivity argument").

In order to satisfy the threshold *Chevron* standard, therefore, the change in law must have been unexpected and unforeseeable. If a party reasonably could have anticipated the overruling of prior law, its reliance on those questionable precedents should not be considered

because it does not materially alter the "justifiable reliance" calculus.

[7] Whether the retroactivity issue involves the state's putative reliance upon old and questionable but not yet overruled cases or upon an arguably tenable but not yet adjudicated legal position, the fundamental inquiry is the same: does the ruling of unconstitutionality upset reasonable expectations based on legal principles upon which the state was entitled to rely when acting in a manner that might violate constitutional rights?

sufficiently justified to warrant protection under *Chevron*. It is only where a new rule entails surprise and thereby disrupts firmly established reliance interests that nonretroactivity should be considered. In particular, it is inappropriate to deny redress to a plaintiff who has suffered constitutional injury if there was a distinct prospect at the time the government acted that the old rule on which it claims reliance would be replaced. Any less demanding standard cannot possibly be squared with this Court's refusal in *Owen* v. *City of Independence*, *supra*, to allow governmental entities to assert a "good faith" defense to damages liability in constitutional cases.

To limit prospectivity to exceptional cases of strong reliance interests, the threshold *Chevron* standard requires a " 'clear break' " (*Johnson*, 457 U.S. at 550 n.12) with "clear past precedent" (*Chevron*, 404 U.S. at 106) on which a party was "entitled to rely" (*Saint Francis College*, 107 S.Ct. at 2025). This means that the overruling decision must

> announce an *entirely new and unanticipated rule of law*. In general, the Court has not subsequently read a decision to work a "sharp break in the web of the law," *Milton v. Wainwright*, 407 U.S. 371, 381 n.2 (1972) (Stewart, J., dissenting), unless that ruling caused "such an abrupt and fundamental switch in doctrine as to constitute an entirely new rule which in effect replaced an older one," *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 498 (1968).

Johnson, 457 U.S. at 551 (emphasis added).[8] Absent a change that "was quite unforeseeable" (*Chevron*, 404 U.S. at 108), the new decision must be applied retroactively.[9]

[8] See also *Hanover Shoe*, 392 U.S. at 499 ("[t]hese cases did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks"); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 488 (1986) (Stevens, J., concurring) (retroactivity is appropriate for any decision that was "presaged in * * * well-established precedent"); *id.* at 494 (Powell, J., dissenting) (retroactivity is not justified when "the decision had not been foreshadowed"). As one commentator has explained:

> [P]rospectivity [was developed] to ease the burden of an unexpected change of law on people who relied on the old rule. Therefore, a court should grant relief *only* when a court has made an "unexpected change of law." * * * [T]he threshold method ensures that a court will not prospectively apply a rule unless the court unexpectedly establishes a new rule of law.

Note, *Confusion in Federal Courts: Application of the* Chevron *Test in Retroactive-Prospective Decisions*, 1985 U. Ill. L. Rev. 117, 137 (emphasis in original).

[9] The lower courts have generally recognized this standard. See, *e.g.*, *Carter* v. *City of Chattanooga*, 850 F.2d 1119, 1123 (6th Cir. 1988) (en banc), pet. for cert. pending, No. 88-817 (filed Sept. 26, 1988) ("[t]he underlying concern expressed in [the retroactivity] cases is the inequity and harshness retroactive application of a new rule of law would impose on parties *who had no significant reason to doubt* the validity or constitutionality of a statute or practice" (emphasis added)); *I.A.M. Nat. Pension Fund* v. *Clinton Engines Corp.*, 825 F.2d 415, 424 (D.C. Cir. 1987) (the party seeking nonretroactivity must show that it "could not reasonably have been expected to have any inkling of the [new rule of] law"); *Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819, 821 (1st Cir. 1984) ("[w]e do not agree that the [new decision] erupted from the Supreme Court firmament like a bolt out of the blue").

The Arkansas Supreme Court took precisely the opposite approach, however. It held that the State had a sufficient reliance interest to justify prospective application of *Scheiner* because "a reasonable person easily could have found [flat highway taxes] to pass Commerce Clause muster" (Pet. App. 4a) under the old *Aero Mayflower* line of cases. But it is not enough that the State in *Scheiner* (or here) had a reasonable argument for a different result, for "as between two surprised parties the burden of surprise should rest on the party who guessed wrong about the direction in which the law was moving" (*Vucitech*, 842 F.2d at 941). As the New

Jersey Supreme Court recently remarked in *Exxon Corp.* v. *Hunt*, 534 A.2d 1, 8 (1987) (emphasis added):

> The purpose of the *Chevron* test is the avoidance of prejudice arising from judicial decisions that interested parties could not fairly have anticipated. In this case the issue of statutory interpretation was *susceptible to either of two resolutions*, one advanced by the State and the other advanced by the plaintiffs. The [United States Supreme] Court's holding that CERCLA partially preempted the Spill Act was not sufficiently unpredictable to satisfy this aspect of the *Chevron* criteria.

As we now show, at the time Arkansas enacted the HUE tax in 1983, there were strong and unmistakable signals that the *Aero Mayflower* line of cases was open to very serious question and that discriminatory flat highway taxes would likely be held to violate the Commerce Clause. Accordingly, the State should not be permitted to avoid the usual legal obligation to return money unconstitutionally collected (see *Carpenter* v. *Shaw*, 280 U.S. 363 (1930); *Ward* v. *Love County*, 253 U.S. 17 (1920)) by claiming justifiable reliance on a line of outmoded precedents.

2. *When the HUE tax was enacted in 1983, the continuing validity of* Aero Mayflower *was in grave doubt*

In holding that the State could justifiably have relied upon the *Aero Mayflower* line of cases when it enacted the HUE tax in 1983, the Arkansas Supreme Court gave no consideration to the validity of those precedents at that time. In fact, however, it is undeniable that they were of questionable validity by 1983 and were in grave danger of being rejected by this Court, as in fact happened in *Scheiner*. By 1983, this Court had fundamentally altered the governing Commerce Clause principles that had prevailed in the days of *Aero Mayflower*,

and it had expressly rejected a number of precedents that rested on the discredited precepts of that era. Had Arkansas given any consideration to the constitutionality of flat highway taxes when it enacted the HUE statute, it could not have failed to see that they presented serious problems under the Commerce Clause. In these circumstances, justice requires the State to bear the risk that its discriminatory action transgressed constitutional rights.

The shakiness of the State's reliance on *Aero Mayflower* is quickly shown by considering the chronology of relevant events. The *Aero Mayflower* line of decisions sustaining the validity of flat highway taxes dates to the period between 1935 and 1950. But flat highway taxes apparently fell into disuse soon thereafter; every flat tax statute mentioned in the *Scheiner* opinion (see 107 S.Ct. at 2841 n.17) was enacted during the 1980s. In the interim, during the period between 1977 and 1981, this Court decided a series of cases, including the seminal ruling in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and the subsequent decision in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), that announced the principles of modern Commerce Clause jurisprudence later relied on in *Scheiner* to invalidate taxes like the HUE tax. Despite the clear warnings that *Complete Auto* and *Commonwealth Edison* provided to state lawmakers, Arkansas chose to enact the HUE tax in 1983. Thus, in the face of recent major changes in this Court's Commerce Clause jurisprudence, the State elected to rely on cases decided nearly half a century earlier, upholding taxes that were obviously discriminatory in practical operation and that had fallen into desuetude for a generation. Against this background, there can be no serious claim of justifiable reliance on settled law.

The watershed in the Court's modern treatment of the Commerce Clause is the 1977 decision in *Complete Auto*.

On its face, the Court's unanimous opinion created a new set of rules to govern state taxation of interstate commerce, expressly overruling the much-cited case of *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951), and rejecting *Spector*'s reliance upon archaic methods of evaluating state taxes. Since then, this Court has often emphasized the importance of *Complete Auto* in modern Commerce Clause analysis,[10] and commentators likewise immediately recognized the seminal nature of the decision.[11] Indeed, in the very year that the Arkansas Legislature enacted the discriminatory HUE tax, the Arkansas Supreme Court recognized that

> in 1977 there was an abrupt change of course * * * [when *Complete Auto*] was decided, and a wholly different approach to state taxing jurisdiction resulted. * * * The court abandoned, as formalistic and impractical, prior standards applicable to challenges to state taxation on interstate commerce and laid down new guidelines for making an appropriate evaluation.

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[10] See, *e.g.*, *D.H. Holmes* v. *McNamara*, 108 S.Ct. 1619, 1623 (1988) (*Complete Auto* is the "leading case in the area"); *Washington Rev. Dep't* v. *Ass'n of Washington Stevedoring*, 435 U.S. 734, 749 (1978) (the Court's ruling "does not effect a significant present change in the law" because "[t]he primary alteration occurred in *Complete Auto*").

[11] See, *e.g.*, Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 Mich. L. Rev. 1426, 1453 (1977) (*Complete Auto* "cleanly broke with the past"); Note, *State Taxation on the Privilege of Doing Interstate Business: Complete Auto Transit, Inc.* v. *Brady*, 19 B.C.L. Rev. 312, 327-328 (1978) (*Complete Auto* "establish[ed] a new conceptual framework"); Lockhart, *A Revolution in State Taxation of Commerce?*, 65 Minn. L. Rev. 1025, 1026 (1981) ("[t]he Supreme Court shook the foundations for the first time in 1977 with *Complete Auto*"); P. Hartman, *Federal Limitations on State and Local Taxation* § 2:17 at 89, § 8:6 at 448 (1981) (*Complete Auto* "relegated [prior cases] to the limbo of useless commerce clause doctrine" and represents an "epochal decision").

Burlington Northern R. Co. v. *Ragland*, 655 S.W.2d 437, 439 (Ark. 1983). And this Court, on the basis of its new analysis in *Complete Auto*, overturned a large number of antiquated Commerce Clause precedents,[12] "display[ing] * * * a remarkable willingness to discard earlier state tax decisions that do not reflect this approach." Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37, 70 (1987).[13]

The Court's decision in *Scheiner* makes it abundantly clear that the new Commerce Clause principles of *Complete Auto* and its progeny spelled the demise of the *Aero Mayflower* line of cases. Noting that flat highway taxes are "unquestionably discriminatory" (107 S.Ct. at 2847), the Court "f[ou]nd dispositive those of our prece-

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[12] See, *e.g.*, *Complete Auto*, *supra*, overruling *Spector*, *supra*; *Ass'n of Washington Stevedoring*, 435 U.S. at 743-750, overruling *Puget Sound Stevedoring Co.* v. *State Tax Comm'n*, 302 U.S. 90 (1937), and *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U.S. 422 (1947); *Hughes* v. *Oklahoma*, 441 U.S. 322, 326-336 (1979), overruling *Geer* v. *Connecticut*, 161 U.S. 519 (1896); *Commonwealth Edison*, 453 U.S. at 614-617, overruling *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); see also *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), overruling *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872) (Import-Export Clause); *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 657-668 (1981), overruling *Lincoln Nat'l Life Ins. Co.* v. *Read*, 325 U.S. 673 (1945) (Equal Protection Clause); *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 361 (1984), overruling *Hooven & Allison* v. *Evatt*, 324 U.S. 652 (1945) (Import-Export Clause).

[13] The impact of *Complete Auto* was perceived in the highway tax context as well. By 1983 several lower courts, applying the modern Commerce Clause principles enunciated in that decision, had recognized that highway taxes that produce substantially different costs per mile for in-state and out-of-state truckers constituted "manifest, severe, and unconstitutional * * * discrimination." *American Trucking Ass'ns, Inc.* v. *Conway*, 451 A.2d 42, 44 (Vt. 1982); see also *American Trucking Ass'ns, Inc.* v. *Quinn*, 437 A.2d 623, 626-627 & n.7 (Me. 1981); *American Trucking Ass'ns, Inc.* v. *O'Neill*, 522 F. Supp. 49, 56-57 (D. Conn. 1981).

dents which make it clear that the Commerce Clause prohibits a State from [discriminating against out-of-state taxpayers]" (*id.* at 2839). Recognizing that such discrimination "contradicts the central purpose of the Commerce Clause" (*ibid.*), the Court relied on *Complete Auto* and other cases dating back to 1977—six years before enactment of the Arkansas HUE tax—to establish that flat highway taxes are invalid "[u]nder our consistent course of decisions in recent years" (*id.* at 2841).

The State in *Scheiner* had "talismanically" invoked the *Aero Mayflower* cases to defend its flat taxes (107 S.Ct. at 2842), but the Court disposed of those decisions as relics of "the pre-*Spector* era" (*id.* at 2833). In particular, the Court explained that the *Aero Mayflower* decisions, like *Spector*, had rested on the rationale that a state could tax an interstate carrier for the "privilege" of using (rather than the actual use of) its highways (*id.* at 2845), a "metaphysical approach to the Commerce Clause" that "our more recent decisions * * * have rejected" (*id.* at 2846; citation omitted). *Complete Auto* therefore not only expressly overruled the *Spector* case itself "but also concluded that 'the philosophy underlying the [privilege] rule * * * [has] been rejected' " (*ibid.*; citation omitted). Accordingly, "i[n] ruling that the theoretical underpinning of this rule had been eroded we *necessarily called into question the future vitality* of [the *Aero Mayflower* cases that were] * * * premised on the [privilege] rule" (*ibid.*; emphasis added).

In addition to *Complete Auto*, the Court in *Scheiner* found that the *Aero Mayflower* cases also were inconsistent with the 1981 *Commonwealth Edison* decision. That case stated unequivocally that "the *measure* of the tax must be reasonably related to the extent of the [taxpayer's] contact" with the taxing jurisdiction (453 U.S. at 626; emphasis in original). Hence, as the Court explained in *Scheiner*, *Commonwealth Edison* clearly

established that " 'when the measure of a tax bears no relationship to the taxpayers' presence * * * in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce' " (107 S.Ct. at 2844, quoting 453 U.S. at 629). While the severance tax at issue in *Commonwealth Edison* satisfied the "fair relation" requirement because it varied with the amount of coal extracted, the same plainly is not true of flat taxes. See *Commonwealth Edison*, 453 U.S. at 645 & n.10) (Blackmun, J., dissenting on other grounds) (the *Complete Auto* test requires that a state "impose a proportional rather than a flat tax rate" in order to ensure that the tax is "fairly related to the services . . . provided by the State"); see also *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 643 n.6 (1984) (the "fairly related" prong of *Complete Auto* recognizes that "an in-state [taxpayer] normally benefits to a greater extent from services provided by the State than does a transient [taxpayer]").[14]

Thus, in light of modern Commerce Clause principles that were "firmly established" (107 S.Ct. at 2846) no later than the *Commonwealth Edison* decision in 1981,

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[14] The Court in *Scheiner* also noted (107 S.Ct. at 2839 n.12, 2840-2841 nn.16, 21) that its decision was consistent with the invalidation of flat taxes in both pre- and post-*Aero Mayflower* cases such as *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489 (1887), and *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946). The Court had cited the *Nippert* line of cases with approval in several opinions handed down shortly before the HUE tax was enacted. See, *e.g.*, *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977); *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980). In addition, the *Scheiner* opinion pointed out (107 S.Ct. at 2841 nn.16, 20) that its decision accorded with academic commentary that had long criticized the *Aero Mayflower* reasoning. See, *e.g.*, Kauper, *State Taxation of Interstate Motor Carriers*, 32 Mich. L. Rev. 171, 203, 207 n.234, 211 (1933); Lockhart, *State Barriers to Interstate Trade*, 53 Harv. L. Rev. 1253, 1267, 1269 (1940); Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 232 (1957).

the Court in *Scheiner* concluded that the *Aero Mayflower* cases could "no longer suffice to uphold flat taxes with * * * blatantly discriminatory consequences" (*id.* at 2845). "The great constitutional purpose of the [Founding] Fathers cannot be defeated by using an apparently neutral 'guise of taxation which produces the excluding or discriminatory effect'" (*id.* at 2847; citation omitted).

Accordingly, were it not for the mere existence of *Aero Mayflower* on the books, any claim in 1983 that the HUE tax was supported by Commerce Clause precedent would have been wholly insubstantial. And the fact that the *Aero Mayflower* decisions had not yet been explicitly rejected did not by itself render it reasonable for the State to rely on them. The contrary reasoning of the Arkansas Supreme Court (Pet. App. 4a) reflects an unrealistic and unduly mechanical view of the judicial process. "[T]he mere fact that the Supreme Court renders a decision overruling prior law is insufficient to satisfy the first part of the *Chevron* test" unless there was *justifiable* reliance on the prior law. *Mineo* v. *Port Authority of New York & New Jersey*, 779 F.2d 939, 944-945 (3d Cir. 1985), cert. denied, 478 U.S. 1005 (1986).[15]

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[15] In this respect the State's reliance interest here is a far cry from that in *National Can Corp.* v. *Department of Revenue*, 749 P.2d 1286 (Wash.), appeal dism'd and cert. denied, 108 S.Ct. 2030 (1988). *National Can* presented the question of the retroactivity of *Tyler Pipe Indus. Inc.* v. *Washington Dept. of Revenue*, 107 S.Ct. 2810 (1987), which had invalidated a multiple activities exemption contained in Washington's business and occupation tax. That exemption had been enacted in 1950 and had been upheld by this Court (as well as by the Washington courts) on several occasions, including as recently as 1983, when the taxpayer's appeal in *Chicago Bridge & Iron Co.* v. *Washington Dept. of Revenue* was dismissed for want of a substantial federal question (464 U.S. 1013). In those circumstances, the reasonableness of Washington's enactment of the multiple activities exemption could not possibly be questioned, and the State accordingly had a strong claim of justifiable reliance on this Court's continued and recent decisions upholding its tax.

Often, a precedent may be eroded long before this Court has occasion to announce its formal demise. See, *e.g.*, *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 672 (1982); *Washington Rev. Dep't* v. *Ass'n of Washington Stevedoring*, 435 U.S. 734, 797 (1978) (overruling prior cases that rested "on a basis rejected by *Complete Auto*"). For example, a decision may be "moribund for * * * years before it [is] formally overruled" (*Johnson*, 457 U.S. at 560). Likewise, a decision may be open to substantial question if it "has been under attack from its inception * * *." *Roberts* v. *Russell*, 329 U.S. 293, 295 (1968). Or a new rule may simply be an "extension of doctrines which had been growing and developing over the years" (*Hanover Shoe*, 392 U.S. at 499). As Professor Moore has explained:

> [D]ecisions of courts of last resort not specifically overruled are not equally trustworthy. The law does not grow so much by checking off fact situations as decided, but by settlement of principles, and by the time the occasion arises to specifically overrule a particular case, its logical foundation may be so undercut by subsequent cases that it is plainly marked for destruction. * * * [R]eliance, to be justified, should take into account not merely any case on all fours, but the present state of the decision as shown by later cases.

1B *Moore's Federal Practice* ¶ 0.402 [3.-2-4] at 91-92 (2d ed. 1988).[16] These considerations are directly applicable here.

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[16] See also Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 947 (1962):

> [I]t will not do for a litigant to claim surprise in cases in which the overruled decision has long been eroded by cases which have all but explicitly overruled it. * * * [Such an unavailing claim] rests not so much upon unfairness resulting from surprise as it does upon unfairness resulting from the necessity of choice in an area in which there is less certainty than one, compelled to act, would wish. * * * [Nonretroactivity

In sum, while *Scheiner* may represent an incremental development in or clarification of Commerce Clause jurisprudence, it certainly does not embody an abrupt and unforeseeable break with clear past precedent. The Commerce Clause principles that proved fatal to the HUE tax have existed at least since *Complete Auto*, and the prospect that *Aero Mayflower* might be overruled should have been apparent to the State when it adopted the tax. The handwriting was on the wall when Arkansas enacted the HUE tax in 1983, but the State chose not to read it. Under *Chevron* (not to mention *Owen*) it is entirely proper for the legal system to require that the State assume the risk that its position, although not frivolous, would be held to lack merit.

This conclusion is not altered by the fact that this Court ultimately decided *Scheiner* by divided vote, or that a majority of the Arkansas Supreme Court had relied on *Aero Mayflower* in upholding the HUE tax prior to *Scheiner*. That reasonable judges could have determined that the old *Aero Mayflower* precedents should still be followed may mean that the issue was an arguable one, but it does not show that *Scheiner* represented an unforeseeable break with prior law.[17]

Since Arkansas cannot meet the threshold prospectivity requirement that *Scheiner* have established a new principle of law, that decision should be held fully retroactive

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would be inappropriate where a]ny good lawyer, asked about the reasonableness of reliance upon the aging precedent, would have counselled that reversal was at least a good possibility.

[17] Justice O'Connor's dissent in *Scheiner* explicitly acknowledged that flat highway use taxes can "pose a serious practical burden for interstate commerce" and that "as a matter of first impression the constitutionality of flat highway use taxes could have been resolved differently [than it had been in *Aero Mayflower*]" (107 S.Ct. at 2848). The dissent rested its unwillingness to invalidate the taxes on the ground that Congress rather than the Court was the more appropriate branch of government to reconsider the rule.

without regard to the other two *Chevron* factors. In any event, those factors—the purposes of the Commerce Clause and the equities of retroactive application—further support the retroactivity of *Scheiner*.

B. Retroactive Application Of *Scheiner* Will Further The Purposes Of The Commerce Clause

The second factor that must be considered under *Chevron* is whether retroactive application "will further or retard [the purpose behind] * * * the rule in question" (404 U.S. at 107) (citation omitted)—here, to counter the inherent tendency of states to discriminate against out-of-state taxpayers and thereby impair a national free trade market. Unlike the first *Chevron* factor, which focuses on the parties' reliance interests, the second factor looks to the broader societal interest in the application of the new—and correct—rule of law. Here, retroactivity will promote Commerce Clause values in two significant ways: remedying Commerce Clause injury; and deterring future violations of the free trade principle. See Tatarowicz, *Right to a Refund for Unstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Law. 103, 119, 141-142 (1987).

1. First, limiting *Scheiner* to prospective application would do nothing to remedy the unconstitutional discrimination against out-of-state taxpayers that has already occurred. The unfair burden that was placed on out-of-state truckers, and the resulting competitive benefit to Arkansas-based truckers, would go unredressed. Likewise, every tax dollar unlawfully exacted would remain in the State's coffers, so that the State would have succeeded for five years in shifting an unfair share of its tax burden to outsiders. These were, of course, the fundamental reasons that the Court in *Scheiner* held that flat highway taxes violate the Commerce Clause. We therefore see little cause to doubt that Commerce Clause

interests would be advanced by righting the competitive scales between in-state and out-of-state truckers.[18]

Indeed, this Court has held that the Fourteenth Amendment requires states to refund taxes exacted in violation of federal law. *Carpenter* v. *Shaw*, 280 U.S. at 369; *Ward v. Love County*, 253 U.S. at 24; see also *Iowa-Des Moines Nat. Bank.* v. *Bennett*, 284 U.S. 239, 247 (1931); *Atchison, T. & S.F.R.R.* v. *O'Connor*, 223 U.S. 280, 285 (1912); *United States* v. *State Tax Comm'n*, 645 F.2d 4, 5 (5th Cir.), cert. denied, 454 U.S. 896 (1981). With particular regard to the Commerce Clause, a federally-compelled refund remedy is necessary to return interstate commerce to "a plane of equality with local trade in local taxation." *Nippert* v. *City of Richmond*, 327 U.S. 416, 434 (1946). The refund remedy responds precisely to the evils caused by the discriminatory HUE tax, and nothing in the second *Chevron* factor supports the State's efforts to avoid the customary legal duty to return money unconstitutionally obtained.

2. Despite the foregoing considerations, the Arkansas Supreme Court found it "'difficult to understand how retroactive application would encourage free trade among

[18] In this respect as well, there are critical differences between the instant case and *National Can, supra*, on which the Arkansas Supreme Court relied (Pet. App. 4a). In *National Can*, the flaw in the tax was a hypothetical "risk" of multiple taxation arising from the failure to meet the requirement of internal consistency, and an acceptable cure was the provision of a credit for taxes paid to other states. See *Tyler Pipe*, 107 S.Ct. at 2820. But because few if any taxpayers were in fact subject to multiple taxation, there was no actual discrimination against interstate commerce. See *National Can*, 749 P.2d at 1292. A grant of refunds in that circumstance would actually have *created* a discrimination against in-state businesses that the Commerce Clause did not require. By contrast, in this case there is a "conceded" disparity of more than 3:1 in the tax burdens of in-state and out-of-state truckers (Pet. App. 2a, 11a); thus, petitioners undeniably suffered direct and substantial financial injury from the type of tax condemned in *Scheiner*.

the states since whatever chill was imposed on interstate trade is in the past'" (Pet. App. 4a, quoting *National Can*, 749 P.2d at 1291). This view that the Commerce Clause is indifferent to a state's retention of unconstitutional taxes ignores the above-mentioned considerations. But even accepting the implicit premise that the Commerce Clause exists only to prevent future interferences with interstate commerce, the court reached the wrong conclusion by failing to consider the deterrent effects of the refund remedy.

Decisions of this Court reviewing the validity of state taxes implement a core purpose of the Commerce Clause: to establish a national free trade market by protecting against the strong incentive that each state has to discriminate against out-of-state (and thus non-voting) taxpayers, thereby shifting the costs of local government to outsiders.[19] If the courts too readily permit states to retain unconstitutionally exacted taxes after a finding that the Commerce Clause has been violated, there will be little to counteract these parochial incentives.[20] As the

[19] See, *e.g.*, *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940) (discussing the "recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state"); *Nippert* v. *City of Richmond*, 327 U.S. at 434-435 ("Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against"); *United States* v. *County of Fresno*, 429 U.S. 452, 458-459 (1977); R. Posner, *Economic Analysis of Law* 602 (3d ed. 1986); L. Tribe, *American Constitutional Law* § 6-5 at 409-411, § 6-16 and 446, § 6-17 at 455-456 (2d ed. 1988).

[20] There is plainly a strong tendency on the part of state courts to permit retention of tax monies by limiting Commerce Clause tax decisions to prospective effect. See, *e.g.*, *Division of Alcoholic Beverages* v. *McKesson Corp.* 524 So.2d 1000 (Fla.), cert. granted, 109 S.Ct. 389 (1988) (consolidated with the present case in this

Court said in *Nippert*, 327 U.S. at 434, "[t]he problem comes down therefore to whether the state or municipal legislative bodies in framing their taxing measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause."

Under the reasoning employed by the decision below, however, nonretroactivity of Commerce Clause cases would be the norm rather than the infrequent exception, because it could almost always be said that the chill on free trade is "in the past." If that were to occur, any impulse state legislators might have to enact constitutionally questionable taxes that favor in-state over out-of-state taxpayers would be reinforced by the knowledge that such preferences would be not only politically advantageous but economically cost-free. If a state were permitted to retain the benefits of a discriminatory tax, it would have little incentive to respect the requirements of the Commerce Clause by enacting a constitutional rather than an unconstitutional measure in the first instance.

Worse yet, even after a tax was held unconstitutional, it would still be tempting to adopt a slightly different but

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Court); *National Can, supra*; *Ashland Oil, Inc.* v. *Rose*, 350 S.E.2d 531 (W. Va. 1986), appeal dism'd for lack of jurisdiction, 107 S.Ct. 1949 (1987); *Salorio* v. *Glaser*, 461 A.2d 1100 (N.J.), cert. denied, 464 U.S. 993 (1983); see also Tatarowicz, *supra*, 41 Tax Law. at 117 & n.89 (collecting cases).

State courts also have relied on other grounds, such as sovereign immunity, in denying refunds of unconstitutional taxes. See *American Trucking Ass'ns, Inc.* v. *Conway*, 508 A.2d 408 (Vt. 1986), cert. denied, 107 S.Ct. 3262 (1987); *Continental Trailways, Inc.* v. *Director, Div. of Motor Vehicles*, 509 A.2d 769 (N.J. 1986), cert. dism'd per stipulation, 107 S.Ct. 1636 (1987); *Private Truck Council of America, Inc.* v. *Secretary of State*, 503 A.2d 211 (Me.), cert. denied, 476 U.S. 1129 (1986). The validity of these rulings is questionable in light of cases such as *Carpenter* v. *Shaw*, *supra*, and *Ward* v. *Love County*, *supra*; see also *General Oil Co.* v. *Crain*, 209 U.S. 211, 226 (1908).

still discriminatory tax, thereby collecting the new tax payment with relative impunity during the several additional years it might take taxpayers to obtain a final judgment striking down the "revised" tax—which is precisely what Florida has done in the companion *McKesson* case (see No. 88-192 Pet. Br. 3-8). This cycle of constitutional violation followed by long, costly, futile litigation would effectively nullify the Commerce Clause's prohibition of discriminatory state taxes. Thus, the refund remedy is essential to deterring states from enacting—and reenacting—unconstitutional levies. See Tatarowicz, *supra*, 41 Tax Law. at 141-142.

This concern is not speculative or hypothetical: the trucking industry's own recent experience bears out the substantial risk to Commerce Clause policies. In this case, for example, there is no indication that Arkansas, when it enacted the HUE tax in 1983, paid the slightest attention to this Court's decisions in *Complete Auto* and other cases that established modern Commerce Clause principles. In fact, when the Arkansas Legislature repealed the HUE tax in October 1987 and replaced it with a 2.5¢ per mile weight-distance tax (1987 Ark. Acts 3 (2d Extr. Sess.)), it ignored a formal opinion of the State's own Attorney General that certain exemptions provided by the new law violated the federal Constitution.[21] The new law also contained a "grandfather" provision that extended the discrimination in the HUE tax for an additional year by treating payment of that flat tax as satisfying the 1987-88 weight-distance tax obligation, regardless of the number of miles operated by the taxpayer's trucks.[22]

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[21] That opinion is reproduced as an appendix to petitioners' reply brief at the petition stage.

[22] The situation in other states is similar. For instance, beginning in 1981, Vermont has passed a series of discriminatory truck taxes, putting new ones in place as rapidly as the old ones are struck down. In an attempt to stem this succession of unconstitutional

Such legislative actions reflect a disturbing indifference to—if not outright disregard of—Commerce Clause requirements and confirm the strong propensity of states to discriminate against out-of-state taxpayers. These tendencies would be encouraged if the Commerce Clause decisions of this Court were not given retroactive effect.[23] Under the ruling of the Arkansas Supreme Court, state legislators are free to engage in a virtual shell game by repeatedly enacting discriminatory taxes, thereby requiring out-of-state taxpayers to pursue lengthy and expensive litigation that leads only to prospective relief.

To protect the fundamental policies of the Commerce Clause, a different incentive structure is plainly necessary. In *Owen* v. *City of Independence*, 445 U.S. at 651-652, the Court noted that monetary relief "serve[s]

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exactions, ATA has brought four separate lawsuits over eight years —and the end still is not in sight. See *American Trucking Ass'ns, Inc.* v. *Conway*, 508 A.2d 405 and 408 (Vt. 1986), cert. denied, 107 S.Ct. 3262 (1987) (striking down facially discriminatory highway tax schemes enacted in 1981 and 1982, but denying refunds on sovereign immunity grounds); *American Trucking Ass'ns, Inc.* v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶ 200-306 (Vt. Super. Ct., Washington Co., Feb. 11, 1988) (ordering refunds of escrowed unconstitutional flat highway tax, enacted in 1986 to replace tax scheme previously struck down), notice of appeal filed, No. 88-156 (Vt. Mar. 11, 1988); *American Trucking Ass'ns, Inc.* v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶ 200-287 (Vt. Super. Ct., Washington Co., May 4, 1987) (ordering refunds of escrowed unconstitutional retaliatory highway tax), notice of appeal filed, No. 87-300 (Vt. June 3, 1987).

[23] One state supreme court justice has recently written about the pressures on state courts and state legislators to favor local parties and interests over out-of-staters. R. Neely, *The Product Liability Mess* (1988). With specific reference to taxation of commerce, Justice Neely writes that "revenue-hungry states persistently devise new schemes to test the frontiers of old interstate tax laws" (*id.* at 73) and that this Court's efforts to control taxation of interstate commerce play a vital role in counterbalancing the parochial pressures that otherwise tend to dominate state court decision-making (*id.* at 75).

as a deterrent against future constitutional deprivations" and provides an "incentive" for government officials "to err on the side of" complying with the Constitution. "Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury" (*id.* at 656). Were nonretroactivity to become the general rule, the government officials "would have little incentive to err on the side of constitutional behavior" and would be " 'encourage[d] * * * to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach' " (*Johnson*, 457 U.S. at 561 (citation omitted)). Accordingly, retroactivity is necessary to encourage state officials to heed the national interests in interstate free trade instead of provincial local concerns that favor in-state over out-of-state taxpayers.

C. The Balance Of Equities Strongly Favors The Retroactivity Of *Scheiner*

The final *Chevron* factor is whether retroactive application would produce "substantial inequitable results" (404 U.S. at 107 (citation omitted)). We note preliminarily that the State's claims of hardship must be assessed in light of the weakness of its reliance interest on pre-*Scheiner* law. As discussed in connection with the first-prong inquiry (pages 14-27, *supra*), this is a case in which, at best, the state of the law was highly uncertain when the discriminatory HUE tax was enacted. As the Court said in discussing the equity prong of the *Chevron* analysis in *Goodman* v. *Lukens Steel Co.*, 107 S.Ct. 2617, 2622 (1987), retroactive application of a new rule "will not * * * result in inequity to [a party who is] charged with knowledge that [the selection of the correct rule] was an unsettled question." Thus, even where the consequences of retroactivity are severe, as with the shortened statute of limitations in *Goodman*, there can be no sub-

stantial inequity in requiring a party to bear the risks it voluntarily assumed by adopting a legally perilous course of action.

Even putting aside the weakness of its reliance interest, Arkansas cannot meet its burden of showing "substantial" inequity from retroactive application of *Scheiner*. To the contrary, this factor weighs strongly in petitioners' favor in view of the lack of any demonstrated harm to the State and the severe economic injury that petitioners suffered from the discrimination inherent in the HUE tax.

"Elemental notions of fairness dictate that one who causes a loss should bear the loss" (*Owen* v. *City of Independence*, 445 U.S. at 654). In *Owen* the court rejected the city's argument that "revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers," explaining that "[i]t hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby" (*ibid.*). Thus, "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated" (*id.* at 655).

This analysis is especially apt with respect to the retroactivity of Commerce Clause decisions. As discussed above (see page 28, *supra*), retroactivity would require the discriminating state to do nothing more than return the taxes it unconstitutionally collected. See *Bradley* v. *City of Richmond*, 416 U.S. 696, 720 (1974) (retroactive application of a new statute is not unjust, because "[t]hese funds were essentially held in trust for the public"). Furthermore, by bringing suit in this case and

Scheiner to set aside discriminatory state taxes, petitioners served not only their own private interest but also the broader public interest in a national marketplace free of the economic dislocations and Balkanization of commerce that, as the Court has recognized (see *Scheiner*, 107 S.Ct. at 2841; *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 406 (1984)), such discrimination can produce. See *Bradley*, 416 U.S. at 718.

The decision below utterly fails to justify the fundamental unfairness of denying retroactive application of *Scheiner* in order to withhold refunds of taxes unconstitutionally exacted. In giving *Scheiner* prospective-only effect, the Arkansas Supreme Court relied on two factors (Pet. App. 4a-5a): first, that the taxes had "already [been] paid into the state treasury" and spent on highway construction and repair; and second, that award of a full refund would afford petitioners "an unconscionable windfall" because it would exceed the amount of any discriminatory injury they suffered from the tax and because they benefited from the use of the State's highways during the years in question. Both of these rationales represent a basic misconception of the "substantial inequity" factor. The Arkansas court's approach, if adopted by this Court, would result in the routine denial of monetary restitution to victims of unconstitutional taxation.

1. *The State can show at most inconvenience from refunding already expended HUE taxes, not any burden that would make a refund inequitable*

Notwithstanding the Arkansas Supreme Court's unexplained assertion, it is far from clear why the fact that the unconstitutional tax proceeds have been "spent" or "counted on for the future" (Pet. App. 5a) should defeat retroactivity. Surely the fact that an unconstitutional fine or civil penalty had been spent by the state

while its validity was being litigated would never justify a refusal to refund it. No reason is suggested why taxes should be different, especially when the defect in the tax is actual, unlawful discrimination that causes a disfavored class of taxpayers to pay more than its share while a favored group pays less.

The Arkansas Supreme Court's emphasis on the payment of the HUE tax into the state treasury was particularly misplaced in the circumstances presented here. At the time this suit was brought—and before any HUE tax revenues had been collected or expended—petitioners sought interim injunctive relief for the precise purpose of forestalling such reasoning if the tax were ultimately invalidated. This preliminary relief was denied by the Arkansas Supreme Court in part on the ground that no irreparable harm would result to petitioners from permitting the State to go forward with collection of the tax (Pet. App. 40a-41a). It was hardly "equitable" for that court later to switch course and hold that petitioners' injuries cannot be remedied because the State had spent the HUE monies. Given petitioners' request for relief *pendente lite*, Arkansas cannot claim any substantial equity based on its receipt and expenditure of the HUE tax proceeds. See, *e.g.*, *Lemon II*, 411 U.S. at 196-197, 204-205.

In any event, assuming that refunding the ill-gotten tax revenues would be inconvenient or even burdensome for the State—and the court below did *not* make such a finding—that hardly establishes that requiring refunds would produce inequitable results, let alone such " 'substantial inequitable results' " as would entail " 'injustice or hardship' " (*Chevron*, 404 U.S. at 107). We question whether the duty to refund illegal taxes can ever be properly classified as inequitable. But whether or not that is so, it is clear that the retroactive application of *Scheiner* would not produce substantial inequitable results.

Contrary to the Arkansas Supreme Court's apparent assumption, the potential inequity to a state from a tax refund cannot be assessed merely on the basis that the tax proceeds have been expended. Rather, it is essential to weigh a variety of other factors as well—such as the amount of the requested refund, the means available for ameliorating the impact of the refund and for raising the necessary monies, and the state's overall financial situation. If it is possible to mitigate the dislocations that might arise from a judgment ordering payment of refunds, it is difficult to understand how such a payment could amount to substantial hardship.

A number of means are available here to cushion the impact of the State's duty to repay the HUE tax. To begin with, it is important to recognize that the HUE tax was a user fee rather than a general revenue measure. Maintenance of the State's highways—an objective that out-of-state truckers desire no less than in-state truckers—can be fully funded by other, nondiscriminatory highway taxes imposed on all truckers, including petitioners, in fair proportion to the wear and tear they actually cause to the State's roads. See *Scheiner*, 107 S.Ct. at 2847 & n.27. Thus, not one cent of the refunds need come from the state treasury or the pockets of general revenue taxpayers; rather, the refunds can be financed by new tax levies, fairly shared by in-state and out-of-state truckers. The State would merely serve as a conduit for rectifying the past discrimination.

Other measures also could be employed to avoid serious dislocations. For example, in the remand proceeding in this case the Arkansas Supreme Court ignored our offer (see ATA's Reply Brief in the Ark. Sup. Ct. (No. 85-101), at 16) to accept refunds paid in installments over a reasonable period of time.[24] Nor was any consideration

[24] That brief expressed (at 14-16) petitioners' continuing willingness to work cooperatively with the State to devise a fair and flexible refund methodology that would minimize any possible disruption to the Arkansas highway program.

given to the possibility of issuing bonds that could be financed by future highway tax revenues; that would allow refunds to be paid immediately, but would spread the cost over the life of the bonds and ultimately recoup the expense from highway users. See Tatarowicz, *supra*, 41 Tax Law. at 143. In light of these reasonable alternatives, the fact that the proceeds from the unconstitutional HUE tax have been paid into the state treasury does not present a substantial inequity that would justify non-retroactive application of *Scheiner*.[25]

2. *The retroactive application of* Scheiner *would not produce a "windfall" for petitioners*

The second "equitable" reason advanced by the Arkansas Supreme Court—that a full refund of the HUE tax would confer a "windfall" on petitioners "far in excess of a fair recovery for the discrimination they may have suffered due to the tax" (Pet. App. 5a)—is equally misguided. At the outset, it should be noted that petitioners simply invoked the refund remedy provided by Arkansas law for an illegally exacted tax. See *City of Little Rock* v. *Cash*, 644 S.W.2d 229, 237 (Ark. 1982), cert. denied, 462 U.S. 1111 (1983); *Streight* v. *Ragland*, 655 S.W.2d 459, 461 n.6 (Ark. 1983). It was not petitioners' position in the Arkansas Supreme Court—and it is not here—that federal law requires more than a refund of such amount as is necessary to undo the unconstitutional discrimination that petitioners suffered on account of the HUE tax. To the extent full refunds would result in a "windfall," that result is a feature of state law and cannot be laid at petitioners' door. Certainly, the court's expressed concern that petitioners not

[25] The contrast is striking between this case and *Chevron*, where the plaintiff would irretrievably have lost his claims if the new rule shortening the statute of limitations had been applied retroactively.

receive an *excessive* refund provides no justification for the complete denial of *any* refund at all.[26]

The denial of *all* relief because of the possibility that a full refund would include a windfall component is particularly unwarranted in the circumstances of this case. As Justice Blackmun noted in granting the escrow, the out-of-state truckers paid more than three times as much tax per mile as the Arkansas-based truckers did (Pet. App. 11a). Accordingly, the "discrimination component" of the HUE tax payments represented more than two-thirds of the total, and full refunds would not greatly exceed the amount of actual injury. This situation is thus wholly unlike that in *National Can*, upon which the Arkansas Supreme Court relied, since the taxpayers in that case could invoke little more than a theoretical risk of discrimination. See note 18, *supra*. The premise of the court below—that a full refund would entail an "unconscionable" windfall "far in excess" of the actual discrimination—is simply unfounded.

For much the same reasons, the suggestion that it would be inequitable to make any refunds because petitioners have benefited from the ability to use the State's highway is untenable. The problem with the HUE tax was that it forced petitioners to pay far more than their fair share for the use of the highways—*i.e.*, it required them also to pay a large part of the in-state truckers' share as well. To refuse petitioners any refund of the discriminatory portion of their tax payments on the

[26] In response to the Arkansas Supreme Court's reasoning, petitioners urged—to no avail—that the court "should exercise its inherent equitable power to make an appropriate *"pro-rata* reduction in * * * refunds" by limiting such refunds "to the amount by which [out-of-state truckers'] tax liability [an average of more than 3.2¢ per mile] exceeded 1¢ per mile [the average tax liability of in-state truckers]" (Appellants' Reh. Pet. 7-8). In this way out-of-state taxpayers would be charged their fair share, but no more, for their "use[] [of] Arkansas highways" (Pet. App. 4a).

ground that they used the highways makes no more sense than saying that if the University of Arkansas charged women three times as much as men to attend its football games, the women would have no equitable claim for a refund because they were allowed to see the game.

D. Other Considerations Also Counsel Against Non-retroactivity In The Tax Refund Context

In addition to its error on the merits of the *Chevron* analysis, the Arkansas Supreme Court's reasoning raises the prospect of increased judicial intrusion into state taxing systems. Insofar as payment of unconstitutional taxes into a state treasury weighs against retroactivity, courts will be more likely to award preliminary injunctive relief restraining the collection or at least the expenditure of the tax, in order to preserve a refund remedy if the taxpayer prevails. See *Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1929). In fact, Justice Blackmun entered just such an injunction in this case (though too late to protect most of petitioners' tax payments), finding "a likelihood that irreparable injury will result if relief is not granted" (Pet. App. 11a). Furthermore, absent a refund remedy, state law might not provide a "plain, speedy and efficient remedy" for claims that state taxes violate federal law, thus freeing federal courts from the constraint of the Tax Injunction Act, 28 U.S.C. § 1341.

These consequences could prove more injurious to the states than the requirement to refund unconstitutional taxes that were of dubious validity when enacted. Injunctions or even escrow orders could leave revenue needs unmet and might thereby force a state's abandonment of a challenged tax whose constitutionality might ultimately have been sustained.

II. EVEN IF *SCHEINER* IS NOT RETROACTIVE, PETITIONERS ARE ENTITLED TO REFUNDS OF PAYMENTS MADE FOR HIGHWAY USE DURING THE TAX YEAR THAT BEGAN AFTER *SCHEINER* WAS DECIDED

If, contrary to the foregoing, the Court concludes that *Scheiner* is not retroactive, the question remains of the proper prospective application of that decision. This, in turn, raises two issues: (1) Was the State obliged to honor the *Scheiner* rule once it was announced by this Court on June 23, 1987, or, as the Arkansas Supreme Court held (Pet. App. 5a), did its obligation to obey the correct constitutional principles run only from the date of Justice Blackmun's interim escrow order (August 14, 1987) specifically applying the principles of *Scheiner* to the HUE tax? (2) Assuming the HUE tax could no longer lawfully be enforced once *Scheiner* was decided, does petitioners' right to a refund relate only to taxes *paid* after that date, or does it cover any HUE tax payment, whenever made, for the privilege of using Arkansas' highways during the post-*Scheiner* tax year? As we now show, Arkansas could not exact the HUE tax for highway use after June 23, 1987, and must refund taxes paid for the post-*Scheiner* period regardless of the date they were actually remitted.

A. *Scheiner* Invalidated The HUE Tax From The Date It Was Decided

By the decision below, the Arkansas Supreme Court suspended the effectiveness of this Court's Commerce Clause holding in *Scheiner* from the date that decision was issued until the time, nearly eight weeks later, that Justice Blackmun entered an interim injunction. Because Arkansas' HUE tax year ran from July to June, this delay had the highly injurious effect of allowing the State to collect virtually a year's worth of additional

discriminatory taxes.[27] There can be no justification—and the Arkansas court offered none—for this refusal to apply *Scheiner* with respect to the State's efforts to exact the unconstitutional HUE tax for the tax year that did not even *begin* until after the date of the *Scheiner* decision. See *American Trucking Ass'ns, Inc.* v. *Goldstein*, 541 A.2d 955 (Md. 1988).

1. It is beyond serious dispute that *Scheiner* doomed the HUE tax, which was materially indistinguishable from the Pennsylvania axle tax invalidated in that case. Pennsylvania's tax was assessed at a rate of 9¢ per mile up to a maximum flat rate of $180 (2,000 miles); Arkansas' HUE tax rate was 5¢ per mile up to a maximum flat rate of $175 (3,500 miles). Both taxes violated the internal consistency principle that was at the heart of the *Scheiner* decision, since their replication by other states would inevitably cause interstate truckers to suffer far heavier tax burdens for the same level of highway use than would be experienced by truckers who operated largely or exclusively within a single state. Moreover, both taxes were shown to have actual discriminatory impacts, costing typical out-of-state truckers many times as much per mile of operation within the State as they cost in-state truckers.[28] And both the State

[27] While the tax year begins July 1, truckers are given until September 1 to display decals on their vehicles evidencing payment of the tax, so that substantial payments are made in June, July, and August. On the other hand, except for vehicles newly placed in service, few payments would be received by the State from September until May or June, when vehicles begin to be requalified for the coming tax year. Because of this timing, it seems probable that most of the tax payments for the 1987-88 tax year would have been made prior to establishment of the escrow.

[28] Compare 107 S.Ct. at 2841 (Pennsylvania taxes discriminate in actual operation) with Pet. App. 2a (Arkansas Supreme Court's statement that "[i]t is conceded that the HUE tax effectively costs other truckers more per mile than it costs those based in Arkansas") and Pet. App. 11a (Justice Blackmun's recognition that "the HUE tax is substantially similar to * * * the Pennsylvania unapportioned flat taxes invalidated in *Scheiner*" and "exposes trucks that engage in extensive interstate operations to a cumulative tax burden * * *. The tax thus works to deter interstate commerce").

of Arkansas in its *amicus* brief on the merits in *Scheiner* (at i, 1, 14, 17-18), and the dissenting opinions in that case (107 S.Ct. at 2849 (O'Connor, J.), 2851 (Scalia, J.); see also *Tyler Pipe*, 107 S.Ct. at 2824-2826 (Scalia, J., dissenting)), recognized that all flat highway taxes, including specifically the Arkansas HUE tax, would be invalid under *Scheiner*.

Despite the clear invalidity of the HUE tax under the Commerce Clause principles applied in *Scheiner*, the Arkansas Supreme Court apparently believed that it was not necessary to give those principles effect in Arkansas until some court or judge had actually applied them to the HUE tax itself. The history of this litigation is the best possible proof of the utter unacceptability of this approach.

Rather than bowing to the obvious implications of *Scheiner* for the HUE tax, the State dug in its heels and sought to continue exacting the tax for as long as the courts would tolerate. As recounted in Justice Blackmun's escrow ruling, the State announced that it would keep collecting the HUE tax during the post-*Scheiner* tax year, while the proceedings on remand from this Court went forward in the state courts, and would bar trucks that failed to pay the unconstitutional tax from using the State's highways. When truckers attempted to pay the HUE tax under protest, in order not to prejudice their refund claims, the State refused to accept their tax payments. And the State declared that, even if the HUE tax collections for the post-*Scheiner* period were held to violate the Commerce Clause, it would assert state sovereign immunity to bar any refunds. See Pet. App. 12a.

The remand proceedings were of a similar character. At the outset, the State opposed petitioners' request for immediate issuance of the mandate from this Court, which Justice Blackmun nonetheless granted. See Pet. App. 10a. The State then opposed petitioners' motion in the Arkansas Supreme Court to remand the case to the Chancery Court for consideration of a preliminary injunction, which motion was prompted by the state supreme court's impending summer recess; the court denied the motion (Pet. App. 15a). The State also successfully opposed petitioners' subsequent motion that the Arkansas Supreme Court itself enter an interim escrow order, and that motion too was denied (*id.* at 14a). In the face of the State's obduracy, petitioners were forced to seek interim relief from Justice Blackmun in his capacity as Circuit Justice. Once again, the State opposed petitioners' request, this time unsuccessfully.[20]

2. It is against this background that the Arkansas Supreme Court's decision must be viewed. Although acknowledging in its March 1988 opinion that *Scheiner* itself left "little doubt that the Supreme Court would hold that the HUE tax is unconstitutional" (Pet. App. 3a), and notwithstanding the deliberate effort of State officials to extend the enforcement of the plainly invalid HUE tax as long as possible, the Arkansas Supreme Court permitted the State to retain the bulk of the unconstitutional taxes collected for the post-*Scheiner* tax year, granting refunds only of the considerably smaller amounts

[20] Arkansas' determination to persist for as long as possible with its highway tax discrimination against out-of-state vehicles has not been confined to the executive and judicial branches. When Arkansas enacted its 2.5¢ per mile replacement tax, it exempted for the first year those who had paid the HUE tax. See page 31, *supra*. As a consequence, high-mileage users of the State's highways (mostly Arkansas-based operators) retained the benefit of the flat tax, and the discrimination against less frequent users (mostly non-Arkansas-based operators) was perpetuated for another year. By itself, this is a clear and independent violation of *Scheiner*.

that were paid after Justice Blackmun's escrow order of August 14. See page 41, *supra*. That date was said to mark the first time that the State was "put on notice" that petitioners' claims "were likely to succeed on their merits" (Pet. App. 5a).

Under this reasoning, it seems quite evident that, had Justice Blackmun not issued an escrow order, the Arkansas Supreme Court would have allowed the State to retain all taxes collected until the date, seven months later, that it finally got around to rendering its own opinion applying *Scheiner* to the HUE tax—a process whose outcome, as the Arkansas Supreme Court candidly acknowledged, was a foregone conclusion. The effective date of a decision of this Court cannot, however, be made to depend upon the pace set by a state court in remand proceedings or the happenstance of the entry of an exceptional injunctive order by a Circuit Justice.

By permitting the State to exact and retain the clearly unconstitutional HUE tax for the year *after* the decision in *Scheiner*, the Arkansas Supreme Court's ruling amounts to nothing less than a refusal to give full *prospective* effect to this Court's holding. This was recognized by Justice Hickman in dissent below (Pet. App. 5a). Nothing in *Chevron* justifies the lower court's circumvention of *Scheiner*.

It is well settled that a new principle of law, even if held to be nonretroactive, is effective on the date that the decision announcing it was handed down. See *Shea* v. *Louisiana*, 470 U.S. 51, 55 n.3, 57 (1985); *id.* at 61 (White, J., dissenting); *Johnson*, 457 U.S. at 542-543; *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 214 (1970). In the case of the prohibition of flat highway taxes, that date was June 23, 1987. If a tax is invalid under *Scheiner*, there is simply no basis for allowing it to be collected and retained from June 23, 1987 forward, at least

with respect to a tax year not beginning until after that date.

As discussed more fully in Section I, the threshold requirement of the *Chevron* test for nonretroactivity is that the decision in question embody a new principle of law. The opinion of the Arkansas Supreme Court might be read to suggest that the date of Justice Blackmun's escrow order is the appropriate one for nonretroactivity purposes because it was not until his accompanying opinion that the State was "put on notice" that the HUE tax was likely to be held invalid. If this was the court's meaning, it is wholly untenable. The fate of the HUE tax was unmistakably sealed by the *Scheiner* decision (see pages 42-43, *supra*), and Justice Blackmun's opinion certainly gives no suggestion that he believed he was announcing a new legal rule. Indeed, the Arkansas Supreme Court did not even cite to Justice Blackmun's order in the portion of its opinion addressing the constitutionality of the HUE tax (Pet. App. 2a-3a).

The Arkansas Supreme Court's approach represents an egregious violation of the principle that the decisions of this Court must be followed by the courts of the states. That court had "little doubt" (Pet. App. 3a) that, under the principles of *Scheiner*, this Court would hold the HUE tax unconstitutional. That being so, it was entirely improper for it to countenance the State's continued post-*Scheiner* enforcement of that tax and retention of the sums unlawfully exacted. There is simply no room in our judicial system for a state to refuse to give immediate effect to the constitutional rulings of this Court.

B. Payments Relating To The Post-*Scheiner* Tax Year Must Be Refunded Regardless Of When They Were Made

Because *Scheiner* was decided so near the end of Arkansas' 1986-87 tax year, there is no controversy regarding payments made for that year. If *Scheiner* is retroactive, they should be refunded; if it is not, they

need not be. But payments for the post-*Scheiner* 1987-88 tax year stand on a different footing. A significant portion of those payments was remitted to the State prior to the date *Scheiner* was handed down. Assuming, as argued above, that the State could not continue to enforce the tax after June 23, 1987, a question remains regarding these pre-June 23 payments.

It is our submission that what must antedate the rendition of a nonretroactive Commerce Clause tax ruling in order for the state to retain the monies is the occurrence of the taxed transaction or the enjoyment of the taxed benefit, not the remittance of the tax. Under the HUE statute, the transaction being taxed was the use of the State's highways. See Ark. Stat. Ann. § 75-817.3(b) (Supp. 1985) ("[a] tax is hereby imposed upon all users * * * in compensation for the use of the highways of this State"), amended in other respects, 1987 Ark. Acts 3 (2d Extr. Sess.). Given the nature of the HUE tax, it would be inconsistent with the prospective application of *Scheiner* to permit the State to retain payments made for the privilege of operating vehicles after July 1, 1987, simply because the payments happened to have been remitted before June 23.

Both this Court and lower courts have recognized that the division between prospectivity and retroactivity depends upon the occurrence of the operative event for the particular transaction at issue. In *Lemon II*, for example, the Court allowed reimbursement to be made after the date of *Lemon I* (*Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)) for services performed prior to *Lemon I*. In so ruling the Court focused on the "patterns of conduct" involved (411 U.S. at 198) and the effect on the "constitutional interests at stake in *Lemon I*" (*id.* at 201). Under that approach, the Court concluded that the occurrence of the underlying transaction, and not the payment of money therefor, was the critical event for prospectivity purposes.

Likewise, in *American Trucking Ass'ns, Inc.* v. *Goldstein, supra,* a case involving flat highway taxes in the wake of *Scheiner,* the Maryland Court of Appeals recognized that a prospective-only decision is applicable to "*operative events* occurring after the date of the decision" (541 A.2d at 959 (emphasis added)). Furthermore, "[f]or purposes of a decision invalidating a tax statute, the operative event * * * is the actual imposition of tax liability" (*ibid*). Accordingly, the court held that *Scheiner* precluded post-*Scheiner* enforcement of an unconstitutional tax even though prior to *Scheiner* the state had anticipated and relied on the receipt of those funds.

The rule we espouse does not necessarily favor the taxpayer over the taxing authority. In the case of transactional taxes, the effect is likely to be the opposite of what it is here, as shown by *Ashland Oil, Inc.* v. *Rose,* 350 S.E.2d 531, 536-537 & n.8 (W.Va. 1986), appeal dism'd for lack of jurisdiction, 107 S.Ct. 1949 (1987). That case involved the retroactivity of *Armco, supra,* which had invalidated a credit provided in the West Virginia wholesaling tax for amounts paid under its manufacturing tax. Ashland had not paid taxes for which its liability accrued prior to the date of the *Armco* decision, and the State had sued to recover those taxes. The West Virginia Supreme Court held (correctly in our view) that the critical date was the one on which the liability accrued (*i.e.*, the taxable sale was made).

As in the above cases, the critical event here is the occurrence of the substantive transaction at issue—the taxable use of Arkansas' highways—not the payment of money that is owed because of the underlying transaction. The opposite result would unfairly discriminate among similarly situated taxpayers on the basis of a completely fortuitous event. Thus, even if *Scheiner* is nonretroactive, it must be applied to taxes imposed for out-of-state

truckers' use of the State's roads after the effective date of this Court's decision.[30]

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted.

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[30] Even if August 14, 1987, when the escrow order issued, were the effective date of invalidation of the HUE tax, it would not follow that the State should be permitted to retain all amounts collected prior to that date. If we are correct that it is the enjoyment of the privilege and not the payment of the tax that is crucial, then Arkansas may not retain more than 5¢ per mile for miles operated between July 1 and August 14. Since the tax payments were made on the basis of the mileage estimated for a full year, many taxpayers would be entitled to significant refunds even under the effective date selected by the Arkansas Supreme Court.

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment to the Constitution deprives this Court of judicial power to require retroactive monetary relief in the form of tax refunds payable from a state treasury.

2. Whether the Commerce Clause may be judicially enforced by requiring a state to reimburse taxpayers for payments made under a state tax statute found to violate that constitutional provision.

3. Whether this Court's decision in *American Trucking Associations* v. *Scheiner*, 107 S.Ct. 2829 (1987), should be applied prospectively so that taxpayers are not entitled to recover refunds of highway taxes collected under a state law later declared to have been invalid in light of *Scheiner*, including the taxes collected after the date of the *Scheiner* decision.

4. Whether petitioners are entitled to refunds of HUE taxes paid between June 23, 1987, when *Scheiner* was announced, and August 14, 1987, when Circuit Justice Blackmun issued an escrow order.

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No. 88-325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents.

On Writ Of Certiorari To The Arkansas Supreme Court

BRIEF FOR RESPONDENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, clause 3, of the Constitution provides:

> The Congress shall have power . . . To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes;

Article III, § 1, of the Constitution provides in relevant part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Article III, § 2, of the Constitution provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the

United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * *

The Eleventh Amendment to the Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Arkansas Constitution, Article V, Section 20, provides:

The State of Arkansas shall never be made defendant in any of her courts.

The Arkansas Highway Use Equalization Tax, 1983 Ark. Acts, No. 685, Ark. Code Ann. §§ 27-35-204, 27-35-205 (1987)(formerly codified as Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (Supp. 1985)) and the Arkansas statute replacing it, 1987 Ark. Acts, No. 3 (2d Ex. Sess.), Ark. Code Ann. §§ 27-35-204, 27-35-205 (Supp. 1987), are reprinted in Appendices B and D, respectively, to respondents' Reply Brief to Petition for a Writ of Certiorari.

STATEMENT

Section 127 of the Surface Transportation Assistance Act of 1982, Pub. L. 97-424, 96 Stat. 2097, 2123, required that states permit motor carriers with a gross weight up to 80,000 pounds

to travel their highways in order to receive their apportioned share of federal funds under the Federal-Aid Highway Act of 1956, Ch. 462, 70 Stat. 374. Faced with this threatened loss, Arkansas raised its weight limit from 73,280 pounds to the federally-mandated 80,000 pounds and enacted a revenue measure in order to compensate the state for the increased costs associated with having such heavy vehicles on its highways.

The Arkansas Highway Use Equalization Tax ("HUE"), 1983 Ark. Acts, No. 685, Ark. Code Ann. §§ 27-35-204, 27-35-205 (1987)(formerly codified as Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (1985 Supp.)), which became effective July 1, 1983, provided that trucks with a gross weight of more than 73,280 pounds, in order to travel within the state, were required to satisfy the HUE tax in one of three ways: payment of a yearly fee of $175; payment of $.05 per mile traveled in Arkansas; or payment of $8.00 for a trip pass entitling the truck to travel 100 miles within the state.

Empty trucks capable of carrying such heavy loads weigh between 29,000 and 31,000 pounds. R. 2308. By raising its weight limits, Arkansas provided operational savings to carriers using such trucks of more than $115 million per year. J. App. 152. Carrying heavy loads was more profitable and trucks weighing more than 73,280 pounds no longer had to circumnavigate the state in order to realize those profits. *Id.* At the same time heavy trucks cause considerable damage to state highway systems and require additional construction, maintenance and repair of highways and bridges.[1] In Arkansas, it was

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[1] Part of Arkansas' increased cost of maintaining highways with heavier weight vehicles is simply a matter of geography. In testimony before the Senate Committee on Commerce, Science and Transportation as part of the Committee's ongoing hearings on regulation of the motor carrier industry, the Executive Director of the American Association of State Highway and Transportation Officials testified that "in the Mississippi Valley area, where you have heavier soils, clays that become very soft under rain . . . [t]he cost to maintain the highway is much higher for these States with heavier axle weights. And that is the reason why some States . . . have tried to maintain lower weight limits. They have a natural problem not of their mak-

estimated that raising the weight limit to 80,000 pounds would cost the state $53 million a year. J. App. 5, 38.

Between July 1, 1983, and October 9, 1987, when the HUE tax was repealed, the tax raised approximately $26 million annually. By August 17, 1987, a total of approximately $122 million in HUE tax revenues had been collected and expended.[2] These revenues were, by statute, dedicated to the state's highway system and deposited into the state treasury on the last day of each month. Ark. Code Ann. § 27-35-205(m) (1987).

Petitioners consist of two certified classes: Arkansas "base registered" carriers whose vehicles were subject to the HUE tax; and carriers "base registered" outside of Arkansas whose vehicles were subject to the HUE tax. J. App. 23. Under the International Registration Plan ("IRP"), of which Arkansas is a member, carriers register their vehicles in order to qualify for apportioned registration fees in the member states. Vehicles that meet the test for base registration are engaged in interstate transportation. J. App. 78. Under the IRP, a carrier has the option of base registering its vehicles in any state so long as it maintains an office there. J. App. 79-81. There is accordingly no necessary relationship between corporate domicile, principal place of business and place of IRP base registration. *Id.* Indeed, some Arkansas base registered petitioners are companies headquartered outside Arkansas. R. 2128-2129.

Petitioners brought this action in 1983 in the Chancery Court of Pulaski County, Arkansas, against the commissioners

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ing." *Hearings on Economic Regulation of the Trucking Industry and S. 1400 before the Senate Committee on Commerce, Science and Transportation*, 96th Cong., 2d Sess. 866 (1979).

[2] Total HUE tax collections through October 9, 1987, when the statute was repealed, were $126.6 million. These figures are taken from the internal records of the state highway department and are set forth in Appendix C to respondents' Reply Brief to the Petition for a Writ of Certiorari ("Rep. Br. App."). The Arkansas Supreme Court's statement that a total of $159 million "was collected and funneled to the state treasury" prior to August 17, 1987 (Pet. App. 3a) apparently is an arithmetic error.

of the Arkansas State Highway Commission, two employees of the Arkansas Highway and Transportation Department, the State Treasurer, the State Commissioner of Revenues, and the Director of the Arkansas Department of Finance and Administration. J. App. 6. Claiming, *inter alia*, that the HUE tax violated the Commerce Clause of the United States Constitution, petitioners sought preliminary and permanent injunctive relief against the deposit of any HUE tax proceeds into the state treasury, a declaratory judgment that the tax was unconstitutional, and a refund of all HUE taxes paid. J. App. 17-19.

On June 1, 1983, by agreement of the parties, the court entered an order placing all HUE tax revenues in escrow. R. 71-72. After an evidentiary hearing showing that the state highway system incurred additional costs of $53 million per year from trucks subject to the HUE tax, the court determined that petitioners had not shown a likelihood of prevailing on the merits and entered an order denying a preliminary injunction unless petitioners posted a bond in the amount of $53 million. Pet. App. 40a-41a. Petitioners had argued that they were entitled to a preliminary injunction because "they will have no remedy at law to recover the questioned tax, once it is deposited by Defendant Fisher to the funds of the State of Arkansas." *See* note 4 *infra*.

Upon petitioners' failure to post a bond, the escrow was dissolved on July 29, 1983. Pet. App. 40a. The Arkansas Supreme Court affirmed the denial of a preliminary injunction without bond, agreeing that the HUE tax would withstand constitutional attack. Pet. App. 40a-41a. After further proceedings, the Chancery Court upheld the tax and the Arkansas Supreme Court affirmed. Pet. App. 17a.[3] The Arkansas

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[3] Petitioners introduced a survey showing that there was a 3-1 disparity in average cost per mile of HUE taxes between non-Arkansas base registered trucks and Arkansas base registered trucks. Pet. App. 11a. (Those responding to the survey were interstate carriers (R. 1940); the record does not show any wholly intrastate carrier having responded.) The disparity arose because these trucks traveled different numbers of miles in Arkansas. The survey was not the

Supreme Court ruled that the HUE tax was "a user fee, passed by the Legislature to compensate the state for the wear and tear on its highways caused by trucks carrying the higher weights" and was valid under the Commerce Clause in light of this Court's rulings in *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950); *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U.S. 495 (1947); *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U.S. 285 (1935); and other cases. Pet. App. 20a-24a, 31a.

On appeal, this Court vacated the judgment of the Arkansas Supreme Court and remanded for "further consideration in light of *American Trucking Associations* v. *Scheiner*, 107 S.Ct. 2829 (1987)." Pet. App. 16a. Circuit Justice Blackmun granted petitioners' motion for immediate issuance of the mandate, and the Court's mandate issued on July 16, 1987. Pet. App. 10a. On remand, the Arkansas Supreme Court denied petitioners' motions for an immediate remand to the Chancery Court and for temporary relief in the form of an escrow pending its decision on the merits. Pet. App. 14a-15a.

On August 14, 1987, while the Arkansas Supreme Court was in summer recess, Circuit Justice Blackmun ordered an immediate escrow of HUE tax proceeds pending the Arkansas Supreme Court's further consideration of the case in light of *Scheiner*. Pet. App. 9a (*American Trucking Associations* v. *Gray*, 108 S.Ct. 2 (1987)). Circuit Justice Blackmun determined that petitioners had shown a likelihood of success on the merits because there "is a significant possibility that the Arkansas courts will declare the HUE tax unconstitutional under the

subject of findings of fact and it does not cover tax years after 1983. Even if the survey were accepted, it is not known whether non-Arkansas base registered trucks traveled fewer miles in the state than their Arkansas based counterparts from 1983 to 1987 and therefore paid more per mile in HUE taxes. (In *Scheiner*, trucks subject to the axle taxes and base registered in Pennsylvania traveled the same number of miles in the state as trucks base registered outside the state. 107 S.Ct. at 2836.) As we later discuss (notes 32,33 *infra*), petitioners' survey did not in any event show a disparity between interstate and intrastate commerce.

'internal consistency' test pronounced by this Court in *Scheiner*." Pet. App. 12a. Circuit Justice Blackmun also found that petitioners would suffer irreparable injury unless an escrow were ordered. He noted that the state officials had asserted sovereign immunity as a bar to tax refunds and that accordingly "there is a substantial risk that [petitioners] will not be able to obtain a refund if the tax ultimately is declared unconstitutional." *Id.*

On October 9, 1987, the Arkansas legislature, meeting in special session, repealed the HUE tax (1987 Ark. Acts, No. 3, § 11 (Second Ex. Sess.)) and replaced it with a tax requiring carriers to pay $.025 per mile for trucks weighing more than 73,280 pounds. 1987 Ark. Acts, No. 3 (Second Ex. Sess.), Ark. Code Ann. §§ 27-35-204, 27-35-205 (Supp. 1987).

The Arkansas Supreme Court subsequently ruled that although the HUE tax had been unconstitutional in view of *Scheiner*, petitioners were not entitled to refunds of the taxes collected under the statute and expended on the state highway system prior to August 14, 1987. Pet. App. 3a. Unlike the $4.9 million collected between August 14, 1987, and October 9, 1987, and held in escrow pursuant to Circuit Justice Blackmun's order—which the Arkansas Supreme Court ordered refunded to petitioners—these tax proceeds had been "paid into the state treasury." Pet. App. 4a. Rejecting petitioners' argument that *Scheiner* should be applied retroactively so as to entitle them to this relief, the Arkansas court ruled that granting refunds "would allow them an unconscionable windfall" and would constitute unfair treatment of the Arkansas base registered truckers who had relinquished any refund claims. Pet. App. 5a. With respect to the escrowed funds, however, these had "not been placed in the state treasury and spent or, presumably, counted on for the future." *Id.*

On remand, the Arkansas Supreme Court had allowed the Arkansas Poultry Association to intervene. These interstate carriers, who were members of the Arkansas base registered class of petitioners, opposed granting tax refunds because the payment of such a large sum would bring chaos in the administration and maintenance of the state's highway program.

Brief for Intervenors, at 11-12. They did not object to a payment of refunds from the escrowed funds since state sovereign immunity applied only when the refunds had been deposited in the state treasury. Brief for Intervenors, at 8 n.2. After the Arkansas Supreme Court's decision, another member of the Arkansas base registered class engaged in interstate transportation—Leon Cawood, a named plaintiff and a petitioner here (Pet. ii)—filed a "Separate Petition for Rehearing" claiming that he was the proper class representative. Although Cawood did not seek HUE tax refunds, he argued that the state should reimburse Arkansas based truckers for all retaliatory taxes they paid to other states. (The Arkansas legislature, in 1985, had passed a statute allowing such reimbursement. Ark. Stat. Ann. §§ 75-817.4—75-817.6 (Supp. 1985).)

Still another group (Owner-Operators Independent Drivers Association Inc.), representing 8000 owner-operators, moved to intervene and filed extensive affidavits showing that petitioners as carriers had passed through the HUE taxes to them, and arguing that if petitioners were awarded refunds they would be receiving a windfall. *See* Motion of Owner-Operators Independent Drivers Association of America to Intervene and for Certification of a Subclass. The Arkansas Supreme Court denied the motion without opinion.

After the Arkansas Supreme Court rendered its decision, the American Trucking Associations, Inc., on behalf of itself and other petitioners, filed a petition for rehearing suggesting that if full refunds would not be granted, the Arkansas court should exercise its equitable powers and award them partial refunds. The Arkansas Supreme Court denied the petition for rehearing on April 25, 1988, without opinion. Pet. App. 7a.

SUMMARY OF ARGUMENT

1. The Eleventh Amendment precludes petitioners from satisfying their demand for tax refunds through this Court. The Eleventh Amendment prevents the federal judiciary from imposing monetary burdens on states for past actions. The Amendment therefore bars the lower federal courts from ordering such retroactive monetary relief. Since the Eleventh

Amendment limits the judicial power of the United States, its restrictions also apply to this Court.

No exception was made in the Eleventh Amendment for that portion of the judicial power constituting the Court's appellate jurisdiction and none could have been intended. The Eleventh Amendment limits the Court's power regardless whether the case was brought originally in federal or state court. A suit commenced in a state court remains a suit against a state to which the federal judicial power does not extend when it reaches this Court.

The Eleventh Amendment's bar against retroactive monetary relief, as applied to this Court in state court cases, no more threatens the supremacy of federal law than does the same bar in the lower federal courts. The doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), permits the lower federal courts to grant prospective relief against state officials. The Court long ago created a similar exception to the Eleventh Amendment for cases on review of state court judgments. This exception for prospective relief rests on the need to ensure uniformity and supremacy of federal law.

As a result, whether the judicial power is restricted by the Eleventh Amendment depends on the effect of the relief. Measured by that standard, petitioners' claim that this Court should reverse the Arkansas Supreme Court's decision denying them tax refunds runs afoul of the Eleventh Amendment's limitation on the judicial power of the United States. Tax refunds payable from the state's treasury for action in the past do not constitute prospective relief.

2. While petitioners seek to establish that *Scheiner* should be applied retroactively, they ignore the critical subsidiary question whether, under the Commerce Clause, refunds may be recovered for taxes paid under a state law that violates the negative implications of that constitutional provision. That question is essentially one of remedy and cannot be answered in terms of retroactivity analysis. When state law precludes recovery of tax refunds, and there is no federal statute on point, only the Constitution can be invoked to supersede state law and

provide such relief. But the rules of retroactivity are not derived from the Constitution.

The Commerce Clause itself does not support the remedy of tax refunds. By its terms, the Clause confers no rights of any sort on petitioners. It grants power to Congress to regulate commerce among the states. When the Court enforces the Commerce Clause on the basis of its negative implications, the Court allocates power between the federal and state governments by determining what is forbidden to the states until Congress acts. If the Court went further and created a national rule of tax refunds, inconsistent with the various laws of the states, the Court would be enforcing the Commerce Clause in a manner at odds with Congress' regulatory role under that constitutional provision. Legislation is almost invariably forward looking. When Congress has rendered certain state tax laws invalid as burdens on interstate commerce, it has legislated prospectively, without seeking to require the states to pay refunds for taxes collected in the past. Congress, as a representative body, is sensitive to the states' financial concerns and knows that an award of tax refunds would have to be satisfied out of current revenues, on which the states depend for their day to day operations. If the courts were to require such awards, the results would be ironic. In Arkansas, highway taxes would have to be raised dramatically in order to pay petitioners. In the name of removing a burden on interstate commerce, the Court would therefore be forcing the state to create a burden on interstate commerce in the form of higher taxes on the interstate carriers who travel its highways. Congress itself has not regulated commerce among the states in this manner and unless and until Congress does so, the matter of tax refunds is committed to state law.

3(a). There is nothing to petitioners' argument that *Scheiner* did not constitute a clear break in the law under the first criterion in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971), for determining whether to give a decision prospective only effect. *Scheiner* overruled not one, but many of this Court's earlier decisions upholding flat highway taxes (the *Aero Mayflower* line of cases). *Scheiner*, moreover, did so on the basis of

the internal consistency test, a new Commerce Clause doctrine.

The proper inquiry is not, as petitioners contend, whether the Court's overruling of the *Aero Mayflower* line of cases was foreshadowed. A clear break occurs, *Chevron* held, if the Court overrules a clear precedent or announces a new legal principle not clearly foreshadowed. The Court has already rejected petitioners' attempted reformulation of this test. *Solem v. Stumes*, 465 U.S. 638, 646 n.6 (1984), held that even if a decision that overrules precedent was foreshadowed, the authorities were entitled to rely on existing law.

In any event, *Scheiner* was not a decision the Arkansas legislature should have or could have prognosticated when it passed the HUE tax in 1983. *Scheiner* was a five-to-four decision, the majority opinion describes the case as a difficult one and decisions rendered before *Scheiner* had cited the *Aero Mayflower* line of cases with approval. This Court retains the exclusive privilege of overruling its decisions and state legislatures are entitled to rely on them.

(b). An award of tax refunds will not further the purpose of *Scheiner*'s internal consistency test to remove *potential* threats to the flow of interstate commerce. The HUE tax, through its repeal, poses no such threat. It is likewise clear that the tax did not deter interstate commerce in the past. The fact that petitioners saved $115 million a year by driving their heavy trucks through Arkansas while paying $26 million per year in HUE taxes demonstrates as much. Petitioners' further argument that the purposes of *Scheiner* would be served by using tax refunds as a sanction against the Arkansas legislature and courts is preposterous. The Arkansas legislature acted responsibly in enacting the tax and in repealing it. The Arkansas courts did not thwart or fail to comply with this Court's decisions.

(c). The balance of equities is strongly in favor of the state. Both certified classes of petitioners—those base registered in Arkansas and those base registered elsewhere—were engaged in interstate transportation. Yet when petitioners claim a dis-

parity in treatment, they point to differences in average costs per mile in HUE taxes between Arkansas based and non-Arkansas based carriers—that is, differences among themselves. Their grievance is that some interstate carriers paid too much per mile in HUE taxes, which necessarily means that some interstate carriers paid too little. What petitioners seek through tax refunds is thus a readjustment among themselves, financed through the Arkansas treasury, when the total tax burden on interstate commerce was not itself excessive and when the proceeds of the tax were expended for the benefit of all petitioners. Moreover, the Arkansas law allowing heavy trucks required payment of both registration fees and HUE taxes and the record confirms that when both are considered, the average disparity shrinks considerably.

During the years in question petitioners not only received the benefit of the state's highway program, but also realized operational savings of $115 million annually by being able to travel Arkansas' highways with their heavily loaded trucks. While petitioners were reaping this benefit they were imposing on the state $53 million dollars in costs for highway construction and repair each year. At the same time, petitioners admitted that at least some of them could and would pass their HUE taxes on to their customers; and the owner-operators who leased their equipment and services to petitioners claimed that they, not petitioners, actually wound up paying the taxes.

The administrative burdens associated with evaluating the economic incidence of the HUE taxes, the actual cost per mile in HUE taxes with respect to hundreds of thousands of trucks, the offsetting costs per mile to carriers in registration fees, and the qualification of any particular carrier for refunds would be enormous. Assuming these obstacles are surmountable, petitioners suggest that there should be a dramatic increase in Arkansas' highway taxes in order to create an excess fund from which to pay them tax refunds. But that itself would inflict a severe burden on interstate commerce. Before such a measure could be adopted, the potential effects of such a tax increase on the Arkansas economy would have to be assessed. Yet that is solely a legislative function.

4. Several days after deciding *Scheiner* on June 23, 1987, this Court vacated and remanded the Arkansas Supreme Court's

judgment upholding the HUE tax for further consideration in light of *Scheiner*. At the time, the Arkansas legislature was not in session, the Arkansas Supreme Court was about to recess for the summer, the new HUE tax year was to begin in only a few days, and tens of thousands of trucks were about to qualify to travel the state's highways with heavy loads by paying the tax for the July 1, 1987—June 30, 1988, tax year. If the HUE tax became unenforceable the moment *Scheiner* was decided, trucks weighing more than 73,280 pounds would have been forbidden to operate in Arkansas. Yet there had been no decision on the merits regarding whether *Scheiner* doomed the HUE tax and in the Arkansas courts petitioners had rested their constitutional arguments on a factual basis that had yet to be tested.

In these circumstances, the Court's decision not to reverse but instead to vacate and remand for reconsideration not only meant that the HUE tax remained in effect, but also accorded the Arkansas legislature time to determine whether to revise the HUE tax in view of *Scheiner* or to enact a new tax statute if necessary, as it did in October. In such circumstances this Court has given Congress a reasonable time to make legislative changes taking account of its decisions and there is no reason why the Arkansas legislature should be treated any differently. State courts too have recognized that midstream changes in a state's tax system in order to accommodate judicial decisions can cause administrative difficulties and fiscal disruption. In order to minimize such problems, the effective date of decisions has been stayed while the legislature enacts replacement legislation. Accordingly, HUE taxes collected for the several weeks after *Scheiner* came down and before Circuit Justice Blackmun's order should not be refunded. To do so would give petitioners a free ride during that period, a period in which the HUE tax remained in effect.

ARGUMENT

I. THE ELEVENTH AMENDMENT DEPRIVES THIS COURT OF JUDICIAL POWER TO REQUIRE RETROACTIVE MONETARY RELIEF

Refunds of all or any portion of the $122 million collected in HUE taxes would have to be paid out of the treasury of Arkan-

sas using the state's current operating revenues. Under state law, sovereign immunity would bar such relief, and the Arkansas Supreme Court has already ruled that petitioners are not entitled to refunds.[4] In this Court, the Eleventh Amendment

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[4] Petitioners admitted as much. *Brief in Support of Motion for Temporary Restraining Order/Preliminary Injunction*, at 1, Chancery Court of Pulaski County, Arkansas, No. 83-2360, May 27, 1983 ("The most harmful result to Plaintiffs and the members of the similarly situated class if they fail to obtain injunctive relief will be the fact that they will have no remedy at law to recover the questioned tax, once it is deposited by Defendant Fisher to the funds of the State of Arkansas."). R. 964.

Respondents have maintained from the outset that petitioners' claim for tax refunds was barred by state sovereign immunity. *See, e.g., Response to Plaintiffs' Motion for Reconsideration*, at 5-6, Chancery Court of Pulaski County, Arkansas, No. 83-2360, Aug. 17, 1983. No decision in Arkansas history has awarded tax refunds against the state after the proceeds have been deposited in the state treasury. R. 875-76.

In general, Arkansas follows the common law rule barring the recovery of taxes paid voluntarily under a statute later declared invalid. *See County of Searcy* v. *Stephenson*, 244 Ark. 54, 424 S.W.2d 369 (1968); *Thompson* v. *Continental Southern Lines, Inc.*, 222 Ark. 108, 257 S.W.2d 375, 379 (1953). While the common law rule has been applied to city and county taxes (*see City of Little Rock* v. *Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982)), state taxes are another matter.

The Arkansas Constitution provides that the state may not be sued in its own courts (Ark. Const., Art. 5, § 20), and common law cannot, of course, supersede the state Constitution. Ark. Code. Ann. § 1-2-119 (1987); *Parker* v. *Arkansas Real Estate Comm'n*, 256 Ark. 149, 506 S.W.2d 125, 127 (1974). State officers may, however, be sued for declaratory and injunctive relief under Article 16, § 13 of the Arkansas Constitution, which permits suits against officials to prevent illegal exactions. *See Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). In such actions, however, the state will nevertheless be considered the real party in interest when refunds would have to be paid from the state treasury; on the other hand, if "at no time the [tax proceeds] were mingled with or became a part of the funds of the State" — as, for example, when an escrow order is in effect—"under such circumstances the suit is not against the State"

precludes petitioners' claim.

The Eleventh Amendment to the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The history of the Eleventh Amendment shows that one of its primary purposes was "to prohibit the [federal] courts from imposing monetary burdens on the states for past actions. If courts could impose liability retroactively, state fiscal policy would be seriously upset. A state would have to appropriate additional funds to pay for liabilities incurred in prior fiscal years when it was unaware of the need for such an allocation." Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L. Rev. 1413, 1444 (1975).

Recognizing this core function of the Eleventh Amendment, the Court has held that the Eleventh Amendment bars federal courts from ordering tax refunds in cases brought against state

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and recovery may be had. *McCain* v. *Crossett Lumber Co.*, 206 Ark. 51, 174 S.W.2d 114, 121 (1943). "According to this view the courts can not by judgment or decree order the payment of money from the treasury." Field, *The Recovery of Illegal and Unconstitutional Taxes*, 45 Harv. L. Rev. 501, 513 (1932). *See also Watson v. Dodge*, 187 Ark. 1055, 63 S.W.2d 993, 995 (1933) (relying, by analogy, on decisions of this Court under the Eleventh Amendment in order to determine whether a suit against an officer should be considered as one against the state).

At all events, Arkansas has not expressly waived its Eleventh Amendment protection. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985) (to constitute a waiver, "a state statute or constitutional provision . . . must specify the State's intention to subject itself to suit in *federal court*") (emphasis in original).

officials.[5] "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. at 464.

Recent decisions of this Court have reinforced the rule that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974). *See Atascadero State Hospital* v. *Scanlon*, 473 U.S. at 238 (1985); *Green* v. *Mansour*, 474 U.S. 64, 68-69 (1985). Although the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), permits federal courts to issue injunctions against state officers (but not the state itself) despite the Eleventh Amendment, retroactive monetary awards do not come within the *Ex Parte Young* exception. "The distinction between that relief permissible under the doctrine of *Ex Parte Young* and that found barred in *Edelman* was the difference between prospective relief on the one hand and retrospective relief on the other." *Quern v. Jordan*, 440 U.S. 332, 337 (1979). Thus, "[r]elief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986).

As the decisions discussed above demonstrate, the Eleventh Amendment would bar the lower federal courts from granting the tax refunds petitioners seek in this case. Because the Eleventh Amendment applies to all federal courts, this Court

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[5] In *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), a non-resident company sued the state treasury department in federal court for a refund of income taxes collected under a state statute that allegedly violated the Commerce Clause and the Fourteenth Amendment. The Court held that the Eleventh Amendment's "express constitutional limitation" on federal judicial power foreclosed any such relief. 323 U.S. at 464. *Accord Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573 (1946); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944).

cannot require any greater relief from the state. By its terms, the Amendment constitutes a restriction on the "Judicial power of the United States" regardless of which federal court seeks to exercise it. That the Amendment was intended to limit this Court is apparent not only from its language but also its history. The Eleventh Amendment was adopted in response to *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), a Supreme Court decision viewed as a direct and substantial threat to the financial security of the states. *See, e. g., Monaco* v. *Mississippi*, 292 U.S. 313, 325 (1934).

It is equally clear that the Eleventh Amendment applies when this Court reviews state court judgments. There is no reason to suppose that the Amendment's limitation on this Court's power relates only to cases within its original jurisdiction. *Chisholm* was such a case, but the resulting text of the Amendment broadly circumscribes the federal judicial power vested in the Supreme Court and in the lower federal courts under Article III. The Eleventh Amendment contains no exception for the Court's appellate jurisdiction and none could have been intended. The public outcry that greeted *Chisholm* v. *Georgia* would have been no less intense—and perhaps even more so—if the Court had subjected the state to liability by reversing a state court decision upholding the state's sovereign immunity. *See Edelman v. Jordan*, 415 U.S. at 662; 1 C. Warren, *The Supreme Court in United States History* 96-102 (1922).[6]

Other language in the Eleventh Amendment further demonstrates that it applies not only to cases brought originally in a federal court but also to cases heard by this Court on appeal.[7]

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[6] Section 25 of the Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85, gave the Supreme Court appellate jurisdiction over state court decisions denying a right claimed under the Constitution. *See Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

[7] Justice Brennan so argued in his dissenting opinion in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. at 294 ("nothing in the text or subsequent interpretations of Article III suggests that the federal judicial power extends more broadly to hear appeals than to decide

The Amendment covers "any suit, in law or equity, commenced or prosecuted" against a state. The scope of the Eleventh Amendment's reach is thus defined at the outset of litigation, regardless whether the action begins in a state or federal court. That is, whenever a suit is "commenced" by a citizen against a state, the Eleventh Amendment forbids the federal judicial power from acting in that case. The action does not lose its character as a suit commenced against a state when it reaches this Court on appeal or certiorari because, as the Court held in *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 408 (1821), that is merely a continuation of the original suit.[8] Thus,

original cases").

Justice Brennan further argued that the Eleventh Amendment does not apply to federal question cases. 473 U.S. at 258-99. *But see* C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 94 (1972), discussing the historical evidence and concluding that the Amendment "was intended to preclude all suits against a state by citizens of other states and aliens—even where the asserted claim sounded in the Constitution or federal law . . . ."

[8] In *Cohens*, Chief Justice Marshall concluded that "[t]o commence a suit, is to demand something by the institution of process in a court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand," 19 U.S. (6 Wheat.) at 408, which is what petitioners are doing here.

Cohens does not hold that the Eleventh Amendment is inapplicable to the Supreme Court's appellate jurisdiction. The Cohens were *defendants* in a state criminal action. Upon their conviction, they took their case to the Supreme Court by writ of error, claiming that the state law violated the Constitution. Virginia argued that the writ of error constituted a "suit . . . commenced" against the state by a citizen within the meaning of the Eleventh Amendment. The Court rejected this argument on the ground that the writ of error was not a new suit and that the case on appeal was merely a continuation of the original action, which the state had "commenced" against the Cohens. 19 U.S. (6 Wheat.) at 409. *See Welch* v. *Texas Dept. of Hwys. and Transp.* 107 S.Ct. 2941, 2950 n.11 (1987)(plurality opinion); *Monaco v. Mississippi*, 292 U.S. at 327; *Hans* v. *Louisiana*, 134 U.S. 1, 19 (1890).

In so holding, Chief Justice Marshall distinguished *Cohens* from cases—such as this—where an individual sues a state and then seeks

as Professor Currie has written, the Eleventh Amendment "seems to limit the Supreme Court's power to review a case within its terms regardless of the court [state or federal] in which it is originally brought." D. Currie, *The Constitution in the Supreme Court, The First Hundred Years, 1789-1888* 424 n. 148 (1985). Indeed, in an appeal from a state court, this Court held that the action was in effect a suit against the state and therefore barred under the Court's Eleventh Amendment decisions. *Louisiana ex rel. The New York Guaranty and Indemnity Co. v. Steele*, 134 U.S. 230 (1890). The Court has never construed the Eleventh Amendment to the contrary.[9]

Supreme Court review. Unlike those cases, in *Cohens* "[n]othing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything." 19 U.S. (6 Wheat.) at 410; *see also id.* at 412. Indeed, at another point, Chief Justice Marshall seemed to agree that a citizen could not sue a state to recover taxes unconstitutionally levied on exports because there would be no constitutional right to such relief. 19 U.S. (6 Wheat.) at 402-03.

[9] In his dissent in *Atascadero*, 473 U.S. at 256 n.8, Justice Brennan stated that there is "a longstanding, though unarticulated, rule that the Eleventh Amendment does not limit exercise of otherwise proper federal *appellate* jurisdiction over suits from state courts" (emphasis in original). (Justice Brennan later argued against such a rule. *See* note 7 *supra*.) However, in none of the decisions cited to support that "unarticulated" proposition did the Court require a retroactive award of damages against a state or other relief that could not have been ordered by a federal district court under *Ex Parte Young*.

Three of the cases involved claims for refunds of unconstitutional state taxes, but the Court refrained from addressing the propriety of that remedy. *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 277 (1984); *Williams* v. *Vermont*, 472 U.S. 14, 28 (1985); *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7, 14-15 (1983). Two of the cases involved easement or land-title disputes in which the decision had purely prospective effect and could have been accomplished through an order to state officers. *Summa Corp.* v. *California ex rel. State Lands Comm'n*, 466 U.S. 198 (1984) (easement claim); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) (land-title claim). Another case involved an individual's claim that he had unconstitutionally been

The Eleventh Amendment's bar against retroactive monetary awards does not render this Court powerless to preserve the supremacy and uniformity of federal law when it reviews state court decisions.[10] The Eleventh Amendment does not govern actions seeking to restrain the collection of allegedly unconstitutional state taxes. *See General Oil Co.* v. *Crain*, 209 U.S. 211, 225-228 (1908). If, for example, petitioners had sought and been denied a preliminary or permanent injunction in state court, the state officials would not have had a legitimate Eleventh Amendment objection to review by this Court. Apart

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disqualified from eligibility for unemployment compensation benefits. But in upholding his eligibility, the Court expressed no view about whether such benefits were to be paid retroactively. *Thomas* v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 719 (1981). In the final case cited by Justice Brennan, the Court sustained a state statute immunizing parole officers from liability for injuries caused by paroled or released prisoners. *Martinez* v. *California*, 444 U.S. 277, 279 (1980).

Justice Brennan did not mention the footnote in *Maine v. Thiboutot*, 448 U.S. 1, 3 n.7 (1980), which stated that "[n]o Eleventh Amendment question is present, of course, where an action is brought in state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States.'" The state had there invoked the Court's appellate jurisdiction to review a state court judgment awarding attorney's fees under 42 U.S.C. § 1988. To the extent that *Thiboutot* means simply that the Eleventh Amendment does not apply to state courts, it does not deal with the question here. That is how the Court itself interpreted the footnote in a decision handed down the same day. *Maher* v. *Gagne*, 448 U.S. 122, 130 n.12 (1980) ("[t]he Eleventh Amendment issue was not before the Court in *Thiboutot* because that case involved an award of fees by a state court pursuant to [42 U.S.C.] § 1988").

[10] In *Ex Parte Young*, 209 U.S. at 151, which rested on the need to preserve the uniformity and supremacy of federal law (*see Green* v. *Mansour*, 474 U.S. at 68; *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 104-105 (1984)(*Pennhurst II*)), the Court relied on *Poindexter* v. *Greenhow*, 114 U.S. 270 (1885), one of the *Virginia Coupon Cases*, which had created a similar doctrine for cases on appeal from state courts. *See also Hopkins* v. *Clemson Agric. College*, 221 U.S. 636 (1911), and cases there cited.

from the Tax Injunction Act (28 U.S.C. § 1341) and principles of comity,[11] a lower federal court could itself have issued an injunction if it had found the state tax law in violation of the Commerce Clause. This Court has no less power when it reviews state court judgments.

It is, however, another matter entirely when the Court is asked, as it is here, to reverse a state court decision refusing to make a retroactive monetary award that would have to be paid out of the state treasury. Regardless of the form of the Court's order reversing such a judgment or the identity of the state defendants, the effect would be the same as if any federal court had issued the directive.[12] In such cases, the Eleventh Amendment restricts the Court's judicial power under Article III to the same extent the Amendment restricts the lower federal courts' judicial power.

In so arguing, we rely on the Court's rulings that "the general criterion for determining when a suit is in fact against the sovereign [and thus barred by the Eleventh Amendment] is the effect of the relief sought." *Pennhurst II*, 465 U.S. at 107 (emphasis in original).[13] The Court therefore has refused to

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[11] *See Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981); *cf. Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 303, 304 n.15 (1952).

[12] It is of no consequence that the Court's mandate would issue to the state court and, therefore, arguably might not be viewed as an order "directly to a State" prohibited by the Eleventh Amendment. *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978). As we argue in the text, the Eleventh Amendment places the same constraints on this Court as the lower federal courts when the *effect* of its judgment is to require retroactive monetary relief.

[13] *See also Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949) (dictum) ("a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property").

extend the *Ex Parte Young* doctrine "to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States." *Pennhurst II*, 465 U.S. at 105. As the Court recognized in *Edelman* v. *Jordan*, 415 U.S. at 665, requiring such retroactive relief necessarily "'fall[s] afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.'"[14] These considerations fully apply regardless whether the judicial power requiring that relief is exercised by a lower federal court or by this Court in a case originating in state court.

None of what we have said is affected by petitioners' insistence that they should be awarded tax refunds in order to compensate them and to deter state legislatures from violating the Commerce Clause. We think both reasons are groundless (*see* pp. 32-41 *infra*), but whatever their merit they cannot alter the Eleventh Amendment's limitation on the judicial power to order the relief petitioners now demand. In *Green* v. *Mansour*, 474 U.S. 64, 68 (1985), the Court held in the clearest possible terms that "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Accord Papasan* v. *Allain*, 478 U.S. 265, 278 (1986). There is no reason why the Court should depart from that principle in this case.[15]

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[14] *Quoting Rothstein* v. *Wyman*, 467 F.2d 226, 237 (2d Cir. 1972) (McGowan, J., sitting by designation), *cert. denied*, 411 U.S. 921 (1973).

[15] Although petitioners cite several cases on appeal from state courts in which this Court addressed claims for refunds of unconstitutional state taxes, none of those cases supports the view that the Court's appellate jurisdiction is exempt from the Eleventh Amendment and some of the cases implicitly support the opposite view. In both *Ward* v. *Board of County Commissioners*, 253 U.S. 17 (1920), and *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), the Court ordered county officials to refund unconstitutional taxes the county had collected. However, the Eleventh Amendment was not implicated because it does not apply to counties. *E.g.*, *Edelman* v. *Jordan*, 415 U.S. at 667 n.12; *County of Lincoln* v. *Luning*, 133 U.S. 529, 530 (1890). Significantly, in *Ward* the Court ruled that the county "could not lessen its liability by paying over a portion of the money" to the state treasury when it knew of the taxpayers' claims. 253 U.S. at 24. This rationale would have been unnecessary had the Court believed that the Eleventh Amendment posed no bar to a refund order directed at the state itself. In *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), the Court reversed a state court judgment denying Indians a refund of state taxes and remanded "for further proceedings not inconsistent with this opinion." 280 U.S. at 369. The Eleventh Amendment was not implicated, however, because at the time of the decision the "federal instrumentality" doctrine treated Indians as instrumentalities of the federal government, and the Eleventh Amendment does not apply to suits between states and the federal government. *E.g.*, *Edelman* v. *Jordan*, 415 U.S. at 669; *United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965); *Gillespie* v. *Oklahoma*, 257 U.S. 501 (1922), *overruled in Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376 (1938).

The short of the matter is that if the lower federal courts cannot, consistently with the Eleventh Amendment, order retroactive monetary relief, the same result cannot be achieved through this Court on review of state court decisions. The judicial power set forth in Article III is circumscribed in both situations. In neither is such relief necessary to maintain the uniformity and supremacy of federal law. *Edelman* v. *Jordan*, and the cases that have followed it, did not rest on the notion that the states would be offended by being subjected to orders from lower federal courts, but not the Supreme Court. Those decisions rested instead on the fundamental purpose of the Eleventh Amendment to prevent the federal judiciary from imposing financial liabilities on the states in citizen suits when the state courts would not allow such relief.

II. JUDICIAL ENFORCEMENT OF THE COMMERCE CLAUSE DOES NOT ENCOMPASS AWARDS OF TAX REFUNDS

Petitioners assume that since the HUE tax violated the Commerce Clause, they are entitled to tax refunds unless *Scheiner* is applied prospectively only. Operating on this assumption, they devote their entire Brief to the subject of retroactivity. Their approach, however, evades a critical sub-

sidiary question, namely whether the Court can enforce the Commerce Clause not only by striking down state tax statutes, but also by requiring the states to reimburse taxpayers for the taxes they paid while the statute was in effect.

That question is essentially one of remedy, as the Court recognized in *Tyler Pipe Industries* v. *Washington State Department of Revenue*, 107 S.Ct. 2810, 2822 (1987), and *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276-77 (1984). When state law precludes such a remedy, as it does in this case,[16] and when as here no federal statute is involved, petitioners must base their tax refund claim directly on the Constitution. Their discussion of retroactivity does not assist them in this respect. As the Court has held, the rules of retroactivity are not derived from any constitutional provision.[17] Indeed, petitioners implicitly acknowledge that their retroactivity arguments rest on no constitutional foundation; notably absent from their Brief is a section, required by Rule 34.1(f), setting forth the constitutional provisions involved.

To the extent petitioners address this matter, they simply assert that they were deprived of their "constitutional rights" and are entitled to refunds because the HUE tax violated the Commerce Clause (Pet. Br. 12, 13). But "[s]uch words as 'right' are a constant solicitation to fallacy" and that is certainly true with respect to petitioners' contentions. *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.). The Commerce Clause, by its terms, confers no constitutional rights of any sort on petitioners, much less a right to monetary relief. The text of Article I, § 8, cl. 3, grants power to *Congress* to regulate

[16] *See*, in addition to note 4 *supra*, the authorities collected in Brief for Intervenors in the Arkansas Supreme Court, at 3-4, 12-17.

[17] The Constitution "neither prohibits nor requires [that] retrospective effect" be given to any "new" constitutional rules. *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965). *See also Solem v. Stumes*, 465 U.S. 638, 642 (1984) ("retroactive application is not compelled, constitutionally or otherwise"); *United States v. Johnson*, 457 U.S. 537, 542 (1982); *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932) (the "Federal constitution has no voice upon the subject" of retroactivity).

commerce among the several states. When the Court acts, as it did in *Scheiner*, to prevent the states from encroaching on Congress' prerogatives, it is acting "not to protect individual rights, but to further the national interest in an efficient economy." *Consolidated Freightways Corp.* v. *Kassel*, 730 F. 2d 1139, 1145 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984). *See also White Mountain Apache Tribe* v. *Williams*, 810 F.2d 844, 849 (9th Cir. 1987) *cert. denied*, 479 U.S. 1060, *reh. denied*, 480 U.S. 941 (1987) ("dormant Commerce Clause . . . has as its primary function the allocation of power between national and state governments"). "Throughout the Commerce Clause cases the emphasis is on the relationship between conflicting federal and state interests, not the relationship between the individual and the state." *Consolidated Freightways*, 730 F.2d at 1145. *See generally Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 440 (1978); *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 537-39 (1949).

As a result, the Court, in its decisions interpreting the negative implications of the Commerce Clause, has assumed an essentially passive role, limited to determining what is forbidden to the states until Congress enters the area through legislation. *See Scheiner*, 107 S.Ct. at 2843 n.23 ("If Congress should disagree with this decision, it would, of course, have the power to authorize flat taxes of this kind."). Petitioners' argument that the Court should go further and require states to refund taxes when state tax laws are found to violate the Commerce Clause is not merely textually unsupportable. If accepted, it would thrust the Court into the role of regulating interstate commerce in a fashion inconsistent with congressional exercises of power in the area. Legislation of any sort, and particularly that regulating interstate commerce, is almost invariably forward looking.[18] If, for example, the *Aero May-*

[18] For example, when Congress invalidated certain state property taxes on motor carrier transportation equipment in the Motor Carrier Act of 1980, it did so prospectively only, despite its conclusion that such taxes "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11503a(b). Similarly, when Congress outlawed certain discriminatory state property taxes on railroads, it

flower rule had been adopted in a federal statute and then replaced with a statute embodying the *Scheiner* ruling, it is safe to assume the new legislation would govern only the future and would not provide refunds for taxes previously paid.[19] This is not only because "[r]etroactivity is not favored in the law" and is a power Congress rarely exercises. *Bowen* v. *Georgetown University Hospital*, 109 S.Ct. 468, 471 (1988); *id.* at 479 (Justice Scalia, concurring)("Retroactive legislation has always been looked upon with disfavor . . . ."). It is also because

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did so prospectively, allowing the states "a 3-year grace period . . . to bring their property taxation systems into compliance with the statutory requirements." *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 458 (1988).

While not legislating directly on the issue of flat highway taxes, Congress has not been entirely silent. The Motor Carrier Act specifically provided its restriction on certain property tax policies of states did not affect other taxation powers of states over motor carriers. 49 U.S.C. § 10521(b)(4) (the Act "does not . . . affect the taxation power of a state over a motor carrier"). The accompanying House Report disclaimed any intention that the Act's proscription would reach flat taxes such as those at issue here:

> The provisions of this section do not apply to that body of taxes known as highway user taxes that are levied on owners or operators of motor vehicles because of their use of public highways. These highway user taxes include, but are not limited to, motor fuel taxes, registration fees, drivers licenses, vehicle user taxes, ton-mile taxes, and other motor vehicle related taxes; the proceeds of these taxes, for the most part, are expended through a State highway fund or otherwise earmarked for highway construction, maintenance or operation.

H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 45 (1980).

[19] *See* Schaefer, *Prospective Rulings: Two Perspectives*, 1982 Sup. Ct. Rev. 1 (1983):

> Legislatures normally look forward. When a legislative body changes a rule of law, the new rule ordinarily governs only conduct that occurs after its enactment. If the effective date of a particular statute is to be deferred, the precise date is stated. . . . [I]n civil matters the constitutional prohibition against impairment of contracts, judicial rules of construction, principles of estoppel, and, ultimately, considerations of substantive due process combine to limit the retrospective application of statutes.

Congress is sensitive to the financial plight of the states and knows, as does this Court, that "taxation is indispensable to their existence." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824).

"The power to require readjustments for the past is drastic," *Brimstone R.R. & Canal Co.* v. *United States*, 276 U.S. 104, 122 (1928), and that is especially true when the readjustment would require a state to deplete its treasury in order to satisfy the demands of private parties who have reaped the benefit of state expenditures. An award of tax refunds would have to be satisfied out of current revenues, upon which the state depends for its day to day operations.[20] Such an award can threaten a state's financial security. When states prepare budgets regarding income and expenditures, they predicate their fiscal affairs on the proceeds from particular taxes. When tax revenues are expended, those "expenditures cannot be undone and reimbursement would have a substantial effect on the State's existing financial requirements. Public fiscal stability is at issue." *Salorio* v. *Glaser*, 93 N.J. 447, 461 A.2d 1100, 1110, *cert. denied*, 464 U.S. 993 (1983).

To require such relief in the name of the Commerce Clause would indeed be ironic. Arkansas' highway taxes are dedicated to the state's highway system. In order to pay petitioners the refunds they demand, whether a full $122 million or some lesser amount, petitioners propose a dramatic increase in taxes imposed on the users of the state's highways. (No one, including petitioners, suggests that the state should create a surplus by decreasing its expenditures on the highways.) Yet such increased taxes would themselves constitute a severe burden

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[20] *Compare* the decree in *Maryland* v. *Louisiana*, 452 U.S. 456, 457 (1981), ordering taxes on natural gas collected by Louisiana to be refunded when the taxes had been deposited in an escrow account pending a decision on the merits and the Federal Energy Regulatory Commission, in the exercise of the authority given it by Congress to regulate interstate commerce, had required that consumers, on whom the economic incidence of the tax fell, be given refunds. *Maryland* v. *Louisiana*, 451 U.S. 725, 737 n.13, 741 (1981).

on interstate commerce, which is why at least some class members intervened to protest the granting of refunds in this case.[21]

In sum, when a state tax law is struck down under the negative Commerce Clause, there is no constitutional right to a refund. Such relief is not of the sort Congress itself would have provided if it had regulated the subject. There is no constitutional basis for creating some national rule of tax refunds, administered by the state courts and, ultimately, this Court.[22] "The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981). Unless and until Congress acts, the matter is therefore committed to state law. As the Court held in a related context, "whether or not the class member will receive [tax refunds] rests entirely with the State, its agencies, courts and legislature, not with the federal court." *Quern* v. *Jordan*, 440 U.S. at 348. *See Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 196-97 (1983).

III. EVEN IF THE *CHEVRON* STANDARDS FOR RETROACTIVITY APPLY, PETITIONERS' CLAIM FOR REFUNDS FAILS

As petitioners see it, *Scheiner* must be given retroactive effect to allow tax refunds because it fails to satisfy any of the three criteria for prospective-only treatment set forth in

[21] *See* Brief for Intervenors in the Arkansas Supreme Court, at 11-12.

[22] The area is complex. In some states recovery of refunds for taxes paid under a statute found to be invalid is regulated by statute. A survey of ten states revealed "a great diversity of statutory refund provisions." Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103, 125 (1987). In other states, recovery of tax refunds is governed by state common law, subject to the state's sovereign immunity. *Id.* at 120-125.

Chevron Oil Co. v. *Huson*, 404 U.S. 97, 106-07 (1971). We disagree for the reasons set forth below.

A. *Scheiner* Was A Clear Break With Past Precedent

The first *Chevron* criterion is straightforward: a "decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ." *Id.* at 106.

Scheiner surely satisfies this criterion. As both the majority and dissenting opinions recognized, *Scheiner* directly overruled not merely one "clear past precedent," but many, including *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950); *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U.S. 495 (1947); and *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U.S. 285 (1935).[23]

In what Justice O'Connor called "an entirely novel enterprise," the majority in *Scheiner* created a test of "internal consistency" that state taxes must pass in order to be upheld under the Commerce Clause. 107 S. Ct. at 2850 (dissenting opinion). Before *Scheiner*, flat highway taxes were considered constitutionally valid so long as they were "moderate in amount," were used for the "upkeep of highways which the carriers must use in the doing of their business," and were imposed on interstate and intrastate "vehicles operated in like conditions." *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U.S. at 289. Although Pennsylvania's taxes satisfied each of those conditions, the Court in *Scheiner* found the taxes unconstitutional.

[23] *See Scheiner*, 107 S.Ct. at 2847 ("Thus, the precedents upholding flat taxes can no longer support the broad proposition . . . that every flat tax for the privilege of using a State's highways must be upheld even if it has a clearly discriminatory effect on commerce by reason of that commerce's interstate character."); *id.* at 2848 (Justice O'Connor, dissenting) ("the Court today directly overrules the holdings of at least three cases"); *id.* at 2851 (Justice Scalia, dissenting).

Scheiner thus established a new principle of law by overruling clear precedent. As we have said, that clearly meets the first *Chevron* criterion. Petitioners argue, however, that Supreme Court opinions delivered before 1983, when Arkansas enacted the HUE tax, made it a near certainty that the Court would rule as it did in *Scheiner*. *See, e.g.*, Pet. Brief, at 26 ("The handwriting was on the wall when Arkansas adopted the HUE tax in 1983, but the State chose not to read it."). But petitioners misstate the rule for determining when there has been a clear break in the law. *Chevron* held that this could occur in one of two ways: the decision *either* overruled a precedent or decided a question of first impression in a way not foreshadowed. Petitioners reformulate this into a requirement that the decision overruling precedents must not have been predictable; otherwise, they contend, no one could justifiably have relied on the previous rule. The Court has already rejected that formulation. *Solem* v. *Stumes*, 465 U.S. 638 (1984), a case petitioners ignore, held that although "[a] decision that overrules much-criticized precedent may well have been clearly foreshadowed . . . authorities are generally entitled to rely on existing case law, whatever its disrepute." 465 U.S. at 646 n.6.

In any event, petitioners' assertion that the Arkansas legislature should have prognosticated the fall of *Aero Mayflower* is scarcely worth serious attention. *Scheiner* was a five-to-four decision; cases in which the outcome is a foregone conclusion do not result in such a closely divided Court and they do not generate opinions of such length and complexity. *See Florida v. Long*, 108 S.Ct. 2354, 2361 (1988). Petitioners also suggest that *Scheiner* merely applied settled principles to the particular facts of the case. But the Court itself saw the matter quite differently. The majority in *Scheiner* thought that determining the validity of the Pennsylvania highway taxes was "by no means easy; the uneven course of decisions in this field reflects the difficulties of reconciling unrestricted access to the national market with each State's authority to collect its fair share of revenues from interstate commercial activity." 107 S. Ct. at 2832-33.

There is nothing to petitioners' further point that the Court's decisions in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), made it fairly certain that, when the occasion arose, the Court would strike down flat taxes of the sort challenged in *Scheiner*. *Complete Auto* did not give the Arkansas legislature—or anyone else for that matter—a clear warning that the *Aero Mayflower* line of cases was about to meet its doom. In 1978, after *Complete Auto* was decided, the Court sent a message that its flat highway tax decisions were alive and well.[24] Moreover, the actual holding of *Complete Auto* did not signal that the Court was about to depart from its earlier rulings. The Court there upheld a state sales tax and rejected the rule of *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951), that state taxes on interstate commerce are *per se* unconstitutional.

Commonwealth Edison, far from supporting petitioners' thesis, further undercuts it. The case involved the constitutionality of a state severance tax on coal. In applying the *Complete Auto* test, the Court thought it important that the severance tax was a general revenue measure rather than the kind of tax involved in this case. Thus, *Commonwealth Edison* "put to one side those cases in which the Court reviewed challenges to 'user' fees or 'taxes' that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. *See, e.g., Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707 (1972); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939) . . . ." 453 U.S. at 621-22.[25] Having said this, the Court then dropped a footnote stating that such taxes "'cannot be tested by standards which generally determine the validity of taxes.'"[26] These statements

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[24] *See Massachusetts* v. *United States*, 435 U.S. 444, 463-64 (1978), *citing Capitol Greyhound Lines* and *Aero Mayflower II* with approval; *Scheiner*, 107 S.Ct. at 2848 (Justice O'Connor, dissenting).

[25] In *Evansville Vanderburgh Airport Auth. Dist.* v. *Delta Airlines*, 405 U.S. 707, 715-17 (1972), the Court also cited the *Aero Mayflower* cases with approval.

[26] 453 U.S. at 622 n.12, *quoting Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 190 (1931).

would lead even the most astute observer to believe that the 1981 decision in *Commonwealth Edison* would not apply to flat highway taxes such as those Arkansas enacted two years later.

Moreover, the *Scheiner* decision itself did not rest on the analytical framework represented by *Complete Auto* and *Commonwealth Edison*. Instead, the Court used a test of "internal consistency"—a phrase the Court had never even uttered before 1983.[27] Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138 (1988). As applied to flat highway taxes, this constituted a new rule of law in Commerce Clause jurisprudence, which provoked not only the dissents in *Scheiner* and *Tyler Pipe Industries* v. *Washington State Department of Revenue*, 107 S.Ct. 2810 (1987), but also scholarly comment recognizing the novelty of the rule and predicting that it "may introduce confusion and uncertainty in an area of the law that has had more than its fair share of both." Hellerstein, 87 Mich. L. Rev. at 188.

B. Awards Of Refunds Will Not Further The Purposes of *Scheiner*

The second *Chevron* criterion requires the courts to examine the purpose and effect of the newly announced rule in order to determine "'whether retrospective operation will further or retard its operation.'" 404 U.S. at 107, *quoting Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965).

The purpose of the *Scheiner* "internal consistency" rule is, the Court stated, to prevent commerce among the States from being deterred. 107 S.Ct. at 2840. "Whether the full brunt, or only a major portion, of [the burden of flat highway taxes] is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial

[27] Petitioners, at one point in their Brief, acknowledge as much. Pet. Br. at 42 ("the internal consistency principle . . . was at the heart of the *Scheiner* decision"); *see also* p. 38 *infra*.

barrier around" the state. *Id.*[28] By ruling as it did, the Court removed this "financial barrier" in Pennsylvania. The state legislature did the same in Arkansas when it repealed the HUE tax.

Thus, the purpose of the *Scheiner* rule has been satisfied because the HUE tax no longer poses any threat to "the free movement of commerce." Tax refunds would not cure any threat that might have existed in the past and, in any event, the idea that the Arkansas tax had deterred interstate commerce is completely unfounded. Prior to 1983, trucks weighing over 73,280 pounds were not permitted to travel on the state's highways. When the state lifted its restriction on these heavy trucks and imposed the HUE tax to compensate for the damage they would cause, petitioners realized operational savings of $115 million per year, which more than offset the $26 million yearly burden of the HUE tax. J. App. 152; Rep. Br. App. C. Moreover, the common carriers among petitioners could pass the tax on to their customers and indicated that they would do so shortly after the tax became effective. J. App. 32. If despite these considerations the HUE tax deterred some truckers from entering Arkansas, giving tax refunds to petitioners is not a remedy. Truckers who did not travel Arkansas' highways are not among the class petitioners represent.

Petitioners' further argument that refunds are needed as a sanction against state legislative overreaching is totally unfounded. The Arkansas legislature acted responsibly when it enacted the HUE tax in 1983 and it acted responsibly when it repealed the statute in 1987 after *Scheiner* was announced. As we have discussed, the *Aero Mayflower* line of cases firmly supported the legislature's enactment of the statute. Petitioners' complaint that legislative repeal did not come soon

[28] As we discuss later, the purpose of *Scheiner* was *not*, as petitioners claim, to remove cost per mile differences among interstate carriers. Petitioners analogize the HUE tax to Pennsylvania's axle taxes, but in *Scheiner* the per mile cost of the axle taxes for Pennsylvania and non-Pennsylvania base registered trucks was the same. 107 S.Ct. at 2836.

enough fails to take into account the facts that the Arkansas legislature convenes in two-year intervals and was not then in session; that this Court, rather than reversing the Arkansas court's decision sustaining the tax, had sent the case back for reconsideration; that *Scheiner* was not an analytically simple decision; and that midstream legislative readjustments of a state's tax system are fraught with difficulties. In any event, the period between the decision in *Scheiner* and the legislature's repeal of the HUE tax—from June 1987 to October 1987—is almost precisely the same amount of time this Court accorded to Congress in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88-89 (1982), in order to allow legislative corrections.[29]

Petitioners also declaim the state courts and contend that refunds are needed in order to keep those courts in line. Pet. Br., at 29-30. What purpose of the negative Commerce Clause that would fulfill they do not explain. Still less can they prove that the Arkansas Supreme Court defied or thwarted any decision of this Court. By initially sustaining the HUE tax on the basis of the *Aero Mayflower* cases, the Arkansas court adhered to firmly established law. It could not have done otherwise. This Court retains the exclusive privilege of overruling its own decisions and until that occurs, the state courts are bound to follow them.

C. The Balance Of Equities Is Clearly Against Petitioners

The third *Chevron* criterion requires a weighing of the equities. 404 U.S. at 107. It is here that petitioners are on the weakest ground of all.

1. Petitioners, all of whom were subject to the HUE tax because of the gross weight of their trucks, consist of two classes: carriers whose vehicles were base registered in Arkansas and carriers whose vehicles were base registered outside

[29] The Court decided the case on June 28, 1982, but stayed the effective date of its judgment until October 4, 1982. 458 U.S. at 89.

Arkansas.[30] It is important to recognize that this distinction in classes, on the basis of the state in which trucks were base registered, is decidedly *not* a distinction between intrastate and interstate carriers[31] or between citizens of Arkansas and citizens of other states. The fact that a truck was base registered in Arkansas pursuant to the International Registration Plan necessarily means that it was engaged in *interstate* transportation. Where a truck was base registered, however, did not depend upon the carrier's state of incorporation or principal place of business. J. App. 80-81; R. 279, 437-39. Indeed, foreign corporations base registered their trucks in Arkansas and thus are among the class of Arkansas based carriers. R. 2128-29.

When petitioners complain that, as a result of the flat HUE tax, non-Arkansas base registered "truckers paid more than three times as much tax per mile as the Arkansas-based truckers did" (Pet. Br., at 39),[32] they are *not* complaining that

[30] Under the International Registration Plan ("IRP") (*see Scheiner*, 107 S.Ct. at 2834), a fleet of vehicles may be registered in a single state, which will then issue the only required plate for the vehicle. Interstate carriers report their mileage under the IRP. *Id.* The amount of the registration fee a truck pays in a state is equal to the percentage of the total miles a truck travels within the state. *Id.* If a truck logged 25 percent of its total miles in Arkansas, for example, it would pay 25 percent of Arkansas' registration fee. The state in which the vehicle is base registered is irrelevant to that calculation.

[31] Under the IRP, apportionable vehicles are those which are engaged in transportation across state lines. Jones Truck Lines, Inc., for instance, was a named plaintiff and is a petitioner in this Court. Pet. iii. Jones, a member of the Arkansas-based class, is headquartered in Arkansas. With 362 trucks, it has authority to haul in 48 states; approximately 77 percent of its total mileage is logged outside Arkansas. J. App. 29-30. (Whether Jones is now seeking HUE tax refunds is not clear. *See* pp. 7-8 *supra*.)

[32] Petitioners' 3-1 figure is based on a survey done by them in the early stages of this litigation; it has not been the subject of findings of fact; and it does not cover tax years after 1983. Thus, even if the survey were accepted, it is not known whether non-Arkansas base registered truckers traveled fewer miles in the state than their Arkansas based counterparts from 1983 to 1987 and therefore paid more per mile in HUE taxes.

intrastate commerce has been favored over interstate commerce.[33] Their grievance is merely that some interstate carriers—that is, some petitioners—had a heavier burden in terms of cost per mile from the HUE tax than other interstate carriers, who are also petitioners in this case.[34] What they refer to as the "discrimination component" (Pet. Br., at 39) represents a distinction *among* interstate carriers.

Unlike the situation in *Scheiner*, whether a truck was base registered in Arkansas or elsewhere had no effect whatever on the total amount of Arkansas registration fees paid for that truck, the cost per mile of such registration fees, the total amount of the HUE tax paid for the truck or the cost per mile of the tax.[35] In terms of these fees and taxes, it was of no financial consequence to Arkansas or to the carriers whether a truck

[33] To what extent interstate carriers paid more per mile than intrastate carriers is unknown and perhaps unknowable. In order to make that calculation, one would have to know the amount of Arkansas mileage logged by intrastate carriers who paid the HUE tax from 1983 to 1987. But intrastate carriers do not report their mileage. R. 1597-1598.

[34] In the Arkansas Supreme Court, the Arkansas Poultry Federation, as intervenors who were Arkansas-based truckers that paid the HUE tax, stressed that they sought no refunds; Leon Cawood, a named petitioner here, contended that he was the class representative of all Arkansas based truckers. Although Cawood also did not seek HUE tax refunds, he and his class claimed they were entitled to recover all retaliatory taxes imposed on them by other states when they engaged in interstate transportation. *See* pp. 7-8 *supra*.

[35] It is of course true that the more miles a truck logged in Arkansas after the $175 flat tax was paid for the year, the less the cost of the tax per mile would be. But such cost-per-mile differences will show up whenever interstate carriers travel different numbers of miles in Arkansas regardless of where they are base registered. (It is not necessarily true that a truck will travel more miles in the states in which it is base registered; that was not, for example, the situation in *Scheiner*. *See* note 36 *infra*.)

was based registered in Arkansas or elsewhere.[36] When petitioners seek to remedy an alleged average three-to-one cost per mile disparity (*see* note 3 *supra*), they are seeking a readjustment among themselves financed through the Arkansas treasury. If, according to their lights, some petitioners paid too much per mile then other petitioners necessarily paid too little. But the total amount of HUE taxes paid by these interstate carriers—the total burden on interstate commerce, which Arkansas spent to keep the state's highways in good repair—was far from excessive.

Indeed, much of the disparity among petitioners in HUE tax costs per mile was offset through registration fees. While Arkansas base registered trucks averaged $.0260 per mile in registration fees, non-Arkansas base registered trucks averaged less than half that amount, or $.0110 per mile.[37] J. App.

[36] With respect to trucks subject to the Pennsylvania axle taxes at issue in *Scheiner*, Pennsylvania base registered trucks traveled "approximately the same number of miles on Pennsylvania's highways" as non-Pennsylvania based trucks. 107 S.Ct. at 2836. Thus, the costs per mile of the axle tax were the same for both classes. Petitioners are incorrect when they state that the Pennsylvania axle taxes had "actual discriminatory impacts, costing typical out-of-state truckers many times as much per mile of operation within the state as they cost in-state truckers." Pet. Br. at 42. The Court's mention in *Scheiner* of actual discrimination at a rate of five to one did not refer to the axle taxes. 107 S.Ct. at 2836 & n.9, 2841. It was aimed at Pennsylvania's $25 marker fee, which applied to all trucks traveling in the state weighing more than 17,000 pounds *except* those registered in Pennsylvania. *Id.* at 2835.

In enacting the axle taxes, Pennsylvania also reduced registration fees for Pennsylvania base registered trucks by the amount of the axle taxes. *Id.* at 2842.

[37] Under the International Registration Plan, of which Arkansas is a member, registration fees are apportioned. *See Scheiner*, 107 S.Ct. at 2834 ("The total fee payable to each State is the product of each State's total fee for full registration of each vehicle and that State's percentage share of the vehicle's mileage."). When Pennsylvania passed axle taxes amounting to $180 per year for the heaviest vehi-

154. The same factor that made the foreign-based truckers' cost per mile greater with respect to the HUE tax—less mileage in Arkansas than their Arkansas based counterparts—coupled with their greater out-of-state mileage, resulted in their paying less per mile in registration fees.[38]

Moreover, if differences in cost per mile in registration fees among interstate carriers are not inequitable or unconstitutional, as *Scheiner* indicated (107 S.Ct. at 2840), differences in cost per mile in HUE taxes were not inequitable. The HUE tax ran afoul of the Commerce Clause for another reason entirely—it could not pass *Scheiner*'s internal consistency test. *See* Pet. Br. at 42; note 27 *supra*. Petitioners' proposed measure of relief—the "discrimination component" among interstate carriers—is unrelated to that test. The nature of their proposed remedy does not, in short, correspond with the nature of the violation.

2. Petitioners cannot reasonably contend that they did not receive substantial benefits from the state during the years in question or that the amount of HUE taxes they paid was out of proportion to those benefits. As we have developed earlier, when Arkansas removed its restriction on trucks with gross weights of more than 73,280 pounds and enacted the HUE tax in order to finance the costs associated with having such heavy trucks on its highways, petitioners saved $115 million per year.

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cles, it reduced its registration fees by the same amount. 107 S.Ct. at 2835. Arkansas did not, however, do the same when it enacted the HUE tax. The upshot is that in Arkansas, when in-state trucks ran up a greater percentage share of their total mileage on Arkansas highways than their foreign-based counterparts, they incurred a much higher cost per mile in such fees.

[38] To illustrate, suppose an Arkansas based truck logged 25,000 of its total of 50,000 miles in the state while a non-Arkansas based truck logged 25,000 miles in Arkansas and 75,000 miles outside the state. For the Arkansas truck the cost would be one-half of Arkansas' $1044 registration fee. J. App. 64. The non-Arkansas based truck, despite traveling the same number of miles in the state, would be registered with a payment of only 25 percent of the fee; its cost per mile, in other words, would be 50 percent less than the cost per mile for the Arkansas based truck.

J. App. 152. Unloaded five-axle trucks weigh between 28,000 and 31,0000 pounds. R. 2308. Carrying loads that would bring the trucks up to a gross weight of 80,000 pounds was more profitable for the truckers and, beginning in 1983, they no longer had to circumnavigate the state in order to do so. From that point on these petitioners inflicted damage to Arkansas's highways of $53 million per year while paying far less than that in HUE taxes.[39] At the same time, the regulated carriers among petitioners could and apparently did pass the Arkansas taxes on to their customers through tariffs filed with the Interstate Commerce Commission. J. App. 32.[40] And it was contended that other carriers among petitioners passed their HUE taxes on to the owner-operators who leased their services and equipment to them. *See* p. 8 *supra*.

3. In the circumstances of this case, the administrative burden associated with giving tax refunds on any fair basis would be intolerable. During the period in question, approximately 220,000 trucks qualified each year by paying either the $175 annual fee or the $.05 per mile charge. Also, in each year approximately 300,000 trip permits were purchased. Rep. Br. App. C. To what extent any particular non-Arkansas based truck paid more per mile in HUE taxes than the average paid by his Arkansas-based counterparts for any year has never been established. The difference—if any—between the cost per mile in HUE taxes paid by intrastate carriers and interstate carriers is unknown and likely unknowable at this point.[41]

At all events, with more than 220,000 trucks having qualified by paying one form or another of the HUE tax each year, the difficulties in reconstructing what in fact occurred and in determining where the economic incidence of the tax on any par-

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[39] As discussed earlier, geography alone contributes to higher maintenance costs related to higher weight vehicles in Arkansas and other Mississippi Valley states than in other states. *See* note 1 *supra*.

[40] The record does not, however, show how many regulated carriers were within the class certified by the state court or the amount of taxes they passed on.

[41] *See* note 33 *supra*.

ticular truck fell would be enormous. Similar administrative burdens could, the Court indicated in *Scheiner*, be of such significance that even flat taxes might be sustained. 107 S.Ct. at 2847. *See Goldberg* v. *Sweet*, 109 S.Ct. 582, 590-91 (1989). It is no answer to suggest, as petitioners do, that the state could avoid such problems by simply providing each non-Arkansas based member of petitioners' class full refunds of all HUE taxes they paid. Relief along those lines would give one group of petitioners the financial benefits of using the state's highways for four years while shouldering none of the burdens their traffic caused. It would also mean that only the Arkansas-based truckers would have paid their way, a circumstance that could give rise to a reasonable claim on their part that the remedy discriminated against them. A dispute among petitioners along those very lines erupted in the Arkansas Supreme Court on remand. *See* p. 8 *supra*.

4. In all of this, petitioners blithely assume that increasing Arkansas tax rates on trucks can easily create a fund out of which they (or some of them) can be paid refunds. Pet. Br. 37. In the first place, if Arkansas raised its highway taxes to that extent, this could easily deter interstate carriers from entering the state. The proposed remedy thus would inflict damage on interstate commerce. Second, whether it is possible or prudent to increase highway taxes is a question courts are simply incapable of evaluating. Determining the effects on the Arkansas economy from increasing the total amount of state highway fees and taxes for such purposes is a legislative task and an extremely difficult one. Where the ultimate burden of increased taxes will fall depends on market structure and how prices are determined. Legislatures take into account not merely the legal incidence of the tax but also "the economic incidence which ensues after the system has adjusted to the imposition of the tax. This, to say the least, is no simple task, even for the economist who may be called upon to advise what the final incidence of particular taxes will be." R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice* 251 (4th ed. 1984).

For its part, Arkansas "had every reason to rely upon the settled understanding that flat highway taxes reasonably

related to the extent of the benefit conferred do not violate the Commerce Clause." *Scheiner*, 107 S.Ct. at 2849 (Justice O'Connor, dissenting). In planning expenditures and structuring its highway program, the state necessarily formulated its budget by relying on HUE tax collections. *See* R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice* 192 (highway expenditures "are a dominant factor in state budgets"). The proceeds of the HUE tax have been spent on highway improvements, maintenance and administration of the program. Contracts were let and matching federal highway funds were received and expended. J. App. 34-37. None of that can be undone. For their part, petitioners have reaped hundreds of millions of dollars in financial benefits and imposed costs on the state of $53 million dollars per year. The HUE tax is no longer being imposed and petitioners are entitled to no further relief in the form of tax refunds.

IV. HUE TAXES COLLECTED PRIOR TO THE ESCROW ORDER SHOULD NOT BE REFUNDED

Petitioners argue that whatever the merits of their retroactivity arguments in general, they are at least entitled to refunds for the period between June 23, 1987, when *Scheiner* was announced, and August 14, 1987, when Circuit Justice Blackmun issued the escrow order.

This case was before the Court when it decided *Scheiner*. However, rather than reversing the decision of the Arkansas Supreme Court sustaining the HUE tax, the Court vacated the judgment, "remanded . . . for further consideration in light of" *Scheiner* (Pet. App. 16a), and issued its mandate on July 16, 1987. Pet. App. 10a. The Court's action necessarily meant that the HUE tax continued in effect at least until the state court concluded its deliberations. During that period those responsible for administering the HUE tax had no other choice than to enforce it, as they did.

When *Scheiner* came down, the Arkansas legislature was not in session, the Arkansas Supreme Court was about to recess for the summer, the new HUE tax year was to begin in only a few days, and tens of thousands of trucks were waiting to

qualify to travel the state's highways with heavy loads by paying the tax for the July 1, 1987—June 30, 1987, tax year. In the Arkansas courts, petitioners had been arguing that the HUE tax was discriminatory in light of their survey showing that, on average, Arkansas-based carriers traveled more miles in the state than non-Arkansas-based carriers. The survey, however, was several years old and had never been found to be accurate. *See* note 3 *supra*. When this Court ordered the case remanded after *Scheiner*, it was therefore far from certain whether a further evidentiary hearing would be needed. If *Scheiner* were thought to rest on cost-per-mile differences resulting from a flat tax, findings of fact would be needed; whether such differences existed in Arkansas[42] would depend upon the relative number of miles traveled each year the HUE tax was in effect.

If the Arkansas officials, in the absence of any judicial decision declaring the HUE tax invalid, had refused to collect HUE tax payments, the consequence would have been a ban on all trucks over 73,280 pounds from Arkansas highways until the court or the legislature acted. (Use of the highways of Arkansas by these heavy trucks was conditioned on the payment of the HUE tax.) Legislative action would have been necessary even if a court found the HUE tax invalid; the HUE tax would have to be replaced with another tax compensating the state for the costs associated with the heavy trucks.

The Court's decision to vacate and remand the case instead of reversing the Arkansas Supreme Court not only allowed the state court time to reconsider its ruling sustaining the tax, but also properly accorded the state legislature time to reassess its tax structure in light of *Scheiner* and to formulate a new system if necessary, as it did. Meeting in Special Session, the Arkansas legislature repealed the HUE tax on October 9, 1987, and replaced it with new taxes on trucks weighing more that 73,280 pounds; these taxes, like the HUE tax, were designed as "compensation for the use of the highways of the state." Ark. Code Ann. § 27-35-205(b)(1) (Supp. 1987) (set forth in Rep. Br. App., at D-1, D-3). Those carriers who had already paid the

[42] They did not in Pennsylvania. *See* note 36 *supra*.

HUE tax for the 1987-88 year, were exempted from the newly-enacted tax for that year. Ark. Code Ann. § 27-35-204 (Supp. 1987) (Rep. Br. App. D-1).

Even if this Court, rather than vacating and remanding, had reversed the Arkansas Supreme Court's judgment, it would have been proper for the Court to give the state legislature some reasonable time to implement a new tax structure. The Court has allowed Congress a reasonable period within which to take account of its decisions striking down federal legislation and to enact substitute legislation. When the Court announced *Northern Pipeline* on June 28, 1982, for example, it stayed the effective date of its order until October 4, 1982, in order to afford Congress an opportunity to enact corrective legislation. 458 U.S. at 88-89. *See also Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976). Nearly the same amount of time transpired here between judicial decision and legislative response. The Arkansas legislature deserved the same consideration given Congress, particularly since this case involves a readjustment to the state's taxing system. Congress itself has recognized as much. When Congress enacted legislation banning certain state taxes on railroads because they constituted burdens on interstate commerce, it granted the states "a 3-year grace period . . . to bring their property taxation systems into compliance with the statutory requirements." *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 458 (1988).[43]

[43] Congress has recognized that the problems arising out of state taxation and regulation of interstate motor carriers are not readily solved. Section 3(b) of the Motor Carrier Act provided for five years of oversight hearings to monitor the effects of the legislative changes. 49 U.S.C. § 10101. Section 19 of the Act directed the Secretary of Transportation and the Interstate Commerce Commission "in consultation with the States . . . to develop legislative or other recommendations to provide a more efficient and equitable system of State regulations for interstate motor carriers." Since that time, Congress (with the Executive Branch, the states and industry representatives) has continued to examine carefully the issues surrounding state taxation and regulation of motor carriers. *See, e.g., Oversight of the*

In the state courts also, the effective date of decisions has been delayed when administrative difficulties or fiscal hardship would follow from giving the ruling immediate prospective effect.[44] In *Salorio* v. *Glaser*, the court announced its opinion striking down New Jersey's commuter tax on June 8, 1983, but permitted the state to continue collecting the tax until December 31, 1983. New Jersey, like Arkansas, had justifiably relied on the validity of its tax "for many years in preparation of budgets, with respect to both income and expenditures, and in making appropriations and expenditures. The expenditures cannot be undone and reimbursement would have a substantial effect on the State's existing financial requirements." 461 A.2d at 1110. New Jersey's fiscal year ended on June 30th; in this case, the HUE tax period expired on the same date and petitioners were required to pay the HUE tax for the 1987-1988 tax year in order to travel Arkansas' highways with their heavy trucks. *Salorio*, like *Scheiner*, was decided in June and as the court recognized, "[g]iven today's budgetary constraints, the competing interests for funds for many worthwhile purposes, and the difficulty in enacting additional taxes, it is unrealistic to expect that the Legislature and Executive will reasonably

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Motor Carrier Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation, 98th Cong., 1st Sess. (1983); *Surface Transportation Issues: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. (1984) *("Surface Transportation Issues")*.

But, to date, Congress has not seen fit to legislate in this area and federal action has been deferred while the National Governors' Association attempts to develop standards for state taxation of motor carriers. *Surface Transportation Issues* at 1201-13, 1319-22, 1327-28. *See also Scheiner*, 107 S. Ct. at 2849 (Justice O'Connor, dissenting).

[44] *See Salorio* v. *Glaser*, 93 N.J. 447, 467-468, 461 A.2d 1100, 1111, *cert. denied*, 464 U.S. 993 (1983); *Hellerstein v. Assessor of Town of Islip*, 37 N.Y.2d 1, 14, 332 N.E.2d 279, 287, 371 N.Y.S.2d 388, 399 (1975), *modified*, 39 N.Y.2d 920, 352 N.E.2d 593, 386 N.Y.S.2d 406 (1976); *Soo Line R. Co.* v. *State Board of Equalization*, 286 N.W.2d 459, 468 (N.D. 1979); *Bond v. Burrows*, 108 Wash.2d 153, 164, 690 P.2d 1168, 1174 (1984).

be able to resolve the best method of dealing with the anticipated loss [by the end of the fiscal year]. . . . The State should be afforded a reasonable period of time to devise alternative revenue raising methods, abandon or postpone transportation projects or consider some other suitable solutions." 461 A.2d at 1110-1111.

For these reasons and those stated in the previous section of this Brief, the fact that Arkansas collected the HUE tax for several weeks after *Scheiner* and used those revenues for ongoing highway projects, without having a definitive judicial decision that the tax was unlawful, does not entitle petitioners to recover refunds from the state treasury for taxes paid before Circuit Justice Blackmun issued the escrow order.

CONCLUSION

For the foregoing reasons, the judgment of the Arkansas Supreme Court should be affirmed.

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Supreme Court, U.S.
FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-325

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*, RESPONDENTS

On Writ of Certiorari to the Supreme Court of Arkansas

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REPLY BRIEF FOR THE PETITIONERS

I. THE RETROACTIVITY OF *SCHEINER* IS A REVIEWABLE FEDERAL QUESTION

A. The Eleventh Amendment Does Not Bar Review By This Court Of A State Court Judgment That Rests On An Interpretation Of Federal Law

This Court has long recognized that the Eleventh Amendment does not limit its appellate jurisdiction over final judgments rendered by state courts (see 28 U.S.C. § 1257) in cases involving monetary claims against a state, even though the Amendment might foreclose the federal courts from assuming original jurisdiction over such claims. See, *e.g.*, *Smith* v. *Reeves*, 178 U.S. 436, 445 (1900); cases cited at page 3, *infra*. And the Court has frequently exercised this authority, as it did in *Scheiner* itself with respect to the repealed $25 marker fee, and again as recently as last month in *Texas Monthly, Inc.* v. *Bullock*, No. 87-1245 (Feb. 21, 1989) (refund claim with respect to repealed tax); see also pages 3-4, *infra*.

Without even mentioning this settled understanding, Arkansas advances (Br. 13-23) the revolutionary contention that the Eleventh Amendment prevents this Court from reviewing the Arkansas Supreme Court's determination of federal law in this case (see also Florida Br. 30-39). Precedent, and the history and purposes of the Eleventh Amendment, demand the rejection of this bold attempt to diminish this Court's authority as the final arbiter of the meaning of federal law.[1]

1. The Eleventh Amendment contention depends entirely on the construction underlying *Hans* v. *Louisiana*,

[1] It is instructive that respondents' novel argument has not been endorsed by any of the nationwide organizations or individual states that have appeared as *amici curiae* supporting affirmance in this case.

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134 U.S. 1 (1890), that the Amendment restricts the federal courts' original jurisdiction not only in cases in which jurisdiction derives from the identity of the parties but also in federal question cases. The Court has before it in other cases the question whether *Hans* should be reconsidered. If the Amendment is held not to limit the federal courts' original jurisdiction over claims arising under federal law (see *Welch* v. *Texas Dep't of Highways*, 107 S.Ct. 2941, 2958-2970 (1987) (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting)), there is obviously nothing left of respondents' attack on the Court's appellate federal question jurisdiction.

It has been suggested that, even if *Hans* was incorrectly decided as an original matter, *stare decisis* justifies adherence to the *Hans* rule. *Welch*, 107 S.Ct. at 2948-2957 (plurality opinion); see also *id.* at 2957-2958 (Scalia, J., concurring in the judgment). If the Court were to let *Hans* stand for that reason, there would of course be no basis for extending *Hans* for the first time to this Court's appellate jurisdiction. Indeed, the very policy of *stare decisis* that might counsel adherence to *Hans* with respect to the federal courts' original jurisdiction weighs strongly against extending that decision to upset the settled view of the scope of this Court's appellate jurisdiction.

2. Even if the Court were to reaffirm *Hans* on the merits, respondents' claim must be rejected. Contrary to their assertion (Br. 19), this Court has never held that the Eleventh Amendment constricts its appellate jurisdiction over cases coming from a state court.[2] The Court

[2] Respondents rely upon a single case—*Louisiana ex rel. New York Guar. and Indem. Co.* v. *Steele*, 134 U.S. 230 (1890)—but that decision in fact rests on the view (later repudiated in *Maine* v. *Thiboutot*, 448 U.S. 1, 9 n.7 (1980)) that the Eleventh Amendment limits *state* courts' jurisdiction over claims against a state. In *Steele*, the Louisiana Supreme Court relied on Eleventh Amendment

instead has repeatedly recognized that when an action against a state is barred from the federal courts' original jurisdiction by the Eleventh Amendment, "[o]f course, a [plaintiff] denied rights secured to him by the Constitution and laws of the United States, and specially set up by him, could bring the case [to this Court] by writ of error from the highest courts of the state." *Chandler* v. *Dix*, 194 U.S. 590, 592 (1904); see also, *e.g.*, *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 470 (1945); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 57 (1944); *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 246 n.5 (1931); *Smith* v. *Reeves*, 178 U.S. at 445; *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 256 n.8 (1985) (Brennan, J., dissenting); *General Oil Co.* v. *Crain*, 209 U.S. 211, 233 (1908) (Harlan, J., concurring); *Proprietors of the Charles River Bridge* v. *Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 585 (1837) (Story, J., dissenting).

In fact, the Court has entered judgment on the merits in more than 60 cases from state courts in which—under respondents' theory—it lacked appellate jurisdiction because the Eleventh Amendment placed the action outside the federal courts' original jurisdiction. These cases consist of suits against states seeking tax refunds on a variety of federal statutory and constitutional grounds,[3] actions to recover retroactive benefits allegedly

decisions to hold that Louisiana state courts lacked jurisdiction to entertain the suit because it was in effect one against the State (38 La. Ann. 337, 340-341 (1886)), and this Court concurred on essentially the same basis that there was no original jurisdiction in the Louisiana courts. Significantly, this Court did not dismiss the appeal or otherwise suggest that *it* lacked appellate jurisdiction. *Steele* thus actually supports the view that the Eleventh Amendment does *not* limit this Court's appellate jurisdiction.

[3] The tax refund cases are listed in the Appendix to this brief. Arkansas attempts (Br. 19-20 n.9) to distinguish some of these cases on the ground that, even though they were suits for refunds, this Court "refrained from addressing the propriety of that remedy." See also Florida Br. 35 n.33. This purported distinction, however,

denied in violation of the Constitution,[4] claims for money damages sounding in contract or tort,[5] and suits against a state in its own name.[6] It apparently was not argued

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is inconsistent with Arkansas' own theory (Br. 18) that "[t]he scope of the Eleventh Amendment's reach is * * * defined at the outset of * * * litigation" by the alignment of the parties and the nature of the relief sought, not on the basis of the particular legal issue brought before this Court. To the extent that this distinction is credible, it shows that this Court *does* have jurisdiction in the present case. The only issue decided by the Arkansas Supreme Court and presented here is whether *Scheiner* is retroactive, not whether Arkansas must pay petitioners a refund.

Arkansas' attempted distinction (Br. 23) of *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), is also unavailing: the Court never held or even intimated that suits by individual Indians were the equivalent of suits by the United States for Eleventh Amendment purposes.

[4] *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Arkansas attempts (Br. 19-20 n.9) to distinguish *Thomas* on the ground that "the Court expressed no view about whether [the unemployment] benefits were to be paid retroactively." But Thomas had sought judicial review of the administrative denial of his benefits claim, not prospective relief; there can be no doubt that the case concerned his right to retroactive benefits.

[5] *Martinez* v. *California*, 444 U.S. 277 (1980); *Baltzer* v. *North Carolina*, 161 U.S. 240 (1896); *Railroad Co.* v. *Alabama*, 101 U.S. 832 (1880)); *Railroad Co.* v. *Tennessee*, 101 U.S. 337 (1880); *Curran* v. *Arkansas*, 56 U.S. (15 How.) 304 (1853). Arkansas tries to distinguish *Martinez* (Br. 19-20 n.9) on the ground that, on the merits, the Court rejected the constitutional challenge to the state statute. But if the Eleventh Amendment barred the Court's exercise of appellate jurisdiction, it would have been unable to enter *any* judgment respecting the merits of the federal claim.

[6] *Summa Corp.* v. *California ex rel. Lands Comm'n*, 466 U.S. 198 (1984); *Bonnelli Cattle Co.* v. *Arizona*, 414 U.S. 313 (1973); *Hughes* v. *Washington*, 389 U.S. 290 (1967). Arkansas argues (Br. 19-20 n.9) that *Summa* and *Bonnelli Cattle* are distinguishable because the relief sought "could have been accomplished through an order to state officers." However, this Court held in *Alabama* v. *Pugh*, 438 U.S. 781, 781 (1978), that "the Eleventh Amendment prohibits federal courts from entertaining suits * * * against States and their agencies," including suits seeking purely prospective relief.

in any of these cases that the Eleventh Amendment circumscribed this Court's appellate jurisdiction. "These decisions nevertheless 'have much weight, as they show that this point neither occurred to the bar or the bench.' The fact that no such argument was even made illuminates the profession's understanding of" the scope of the Eleventh Amendment. *United States* v. *Ross*, 456 U.S. 798, 819 (1982) (citation omitted).

3. The distinction drawn by this Court between the federal courts' original jurisdiction and this Court's own appellate jurisdiction is strongly rooted in the history and purposes of the Eleventh Amendment.[7]

First, the Amendment was adopted to overrule this Court's decision in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that the Court's *original* jurisdiction extended to a suit against a state on a state-law claim. The focus of the Amendment was thus the federal courts' original jurisdiction; there is no evidence that the proponents of the Amendment also intended to constrain the Court's appellate jurisdiction over cases decided by state courts. Indeed, "[h]ad the amendment been regarded as immunizing the states from the federal appellate process, it is almost inconceivable that it would have enlisted such broad support" from the Federalist majority in Congress. C. Jacobs, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 93 (1972).

The fact that an action might be permissible in a different form does not empower a court to ignore the Eleventh Amendment bar.

[7] Arkansas makes much (Br. 15, 17-18) of the text of the Eleventh Amendment, but this Court's decisions are noteworthy for their willingness to depart from the literal language in construing that provision. *Hans* itself expands the scope of the Amendment well beyond its plain language to encompass suits against a state by its own citizens. See also *Monaco* v. *Mississippi*, 292 U.S. 313 (1934) (suits by a foreign state barred). Moreover, to the extent respondents invoke the Amendment's plain language, they must overcome the fact (which they do not even address) that in light of its last 14 words the Amendment is most naturally read not to encompass federal question cases at all. See *Welch*, 107 S.Ct. at 2962, 2964-2965 (Brennan, J., dissenting).

Second, the Court's refusal to apply the Eleventh Amendment to limit its appellate jurisdiction is easily justified under the analysis the Court has used to distinguish between actions for retrospective relief (which are not within the federal courts' original jurisdiction) and suits seeking prospective relief. This distinction is designed to reconcile the competing interests in federal supremacy and state sovereignty by "permit[ting] the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States' " while at the same time "preserving to an important degree the constitutional immunity of the States." *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105-106 (1984) (citation omitted).

Review by this Court of questions of federal law decided by a state court in actions commenced against a state is at most an inconsequential intrusion upon state sovereignty. In virtually all such cases, a state court has previously determined that it had the power to bind the state by its adjudication of the federal law issue, either because there was no claim of sovereign immunity by the state, because such a claim was rejected, or because the state court found it unnecessary to dispose of the immunity claim in order to decide the federal law issue on the merits. In the present case, for example, the Arkansas Supreme Court decided an issue of federal law related to the merits of petitioners' claim without addressing Arkansas' assertion that refunds are barred by sovereign immunity.[8] Where, as here, a state has consented

[8] The State's contention (Br. 14 & n.4) that the court below held the present suit barred by sovereign immunity is preposterous. The State's sovereign immunity argument was thoroughly aired before the Arkansas Supreme Court, yet there is not a single word in that court's opinion addressing the issue. See *Michigan* v. *Long*, 463 U.S. 1032, 1044 (1983). Moreover, the Arkansas Supreme Court already has held that Article 16, Section 13 of the Arkansas Constitution, which prohibits illegal exactions, (1) applies to state as well as local taxes (see *Streight* v. *Ragland*, 655 S.W.2d 459, 461 n.6 (Ark. 1983)), and (2) provides for monetary refunds as well as prospective equitable relief (see *City of Little Rock* v. *Cash*, 644 S.W.2d

to be sued on an issue implicating federal law, it is difficult to see how this Court's examination of the federal law question already decided by the state court could effect an undue intrusion into state affairs.

On the other hand, this Court's ability to exercise appellate jurisdiction over state court decisions interpreting federal law is critical to maintaining the supremacy of federal law. See *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341-351 (1816). As we have discussed (see pages 3-4, *supra*), application of the Eleventh Amendment to the Court's appellate jurisdiction would work a substantial diminution in the Court's authority. The disposition of federal constitutional and statutory issues in entire classes of cases—suits for certain government benefits, claims for tax refunds, actions in inverse condemnation—would be left entirely to state courts, free of any concern that this Court might review and reverse their decisions. Such a wholesale reduction in this Court's jurisdiction would injure to an intolerable degree the fundamental interests in uniform application of federal law and vindication of federal rights.[9]

229, 237 (Ark. 1982), cert. denied, 462 U.S. 1111 (1983)). Indeed, at an earlier stage of this very case, petitioners were paid refunds of HUE taxes collected pursuant to invalid emergency regulations. Pet. App. 32a. See also *Ragan* v. *Venhaus*, No. 82-4503 (Pulaski Cty. Ch. Ct. July 22, 1987), on remand from 711 S.W.2d 467 (Ark. 1986) (ordering State to refund "collection fee" to taxpayers from state treasury).

For this reason, there is no need to consider Arkansas' argument (Br. 17) that a decision by this Court overturning a state court ruling resting on sovereign immunity would intrude deeply upon state sovereignty. Whatever the merits of that contention, this is not such a case: the Arkansas Supreme Court denied petitioners refunds of illegal HUE taxes based solely on its federal law holding that this Court's decision in *Scheiner* was not retroactive, not because the claim was barred by sovereign immunity.

[9] Moreover, application of the Eleventh Amendment in this manner would lead to anomalous results. For example, the Court would have jurisdiction to review state court judgments in eminent domain actions instituted by the state but could not review the disposition of identical federal issues arising in inverse condem-

For these reasons, the State's facile syllogism (Br. 17) that the Framers of the Eleventh Amendment would have been as offended by appellate review of federal questions decided by state courts as they were by the Court's exercise of its original jurisdiction in *Chisholm* to impose liability on a state law ground is completely unsound.

B. There Is No Merit To The Other Reasons Offered By Respondents And Their *Amici* For Not Reaching The Retroactivity Issue

1. In yet another effort to avoid the retroactivity issue on which the Court granted certiorari, Arkansas contends (Br. 23-28) that the Constitution does not require a refund of taxes collected in violation of the Commerce Clause. In respondents' view (*id.* at 24), "[t]he Commerce Clause, by its terms, confers no constitutional rights of any sort on petitioners, much less a right to monetary relief." Arkansas' argument not only is inconsistent with longstanding precedent,[10] but, more importantly for present purposes, is irrelevant to this case.

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nation actions. Similarly, a taxpayer who paid a state tax and then sued for a refund on the ground that the tax violated the Constitution could not invoke this Court's jurisdiction, while a taxpayer who refused to pay the same tax—and was sued for nonpayment by the state—could obtain review of the state court's disposition of his federal claim. Compare *Ashland Oil, Inc.* v. *Rose*, No. 88-421 (juris. statement filed Sept. 9, 1988). Indeed, this anomaly in the tax context would give taxpayers an incentive to withhold payment of questionable taxes and would encourage courts to look more favorably on requests for preliminary injunctive relief—thus leading to more disorderly and intrusive litigation of federal challenges to state taxes.

[10] Under respondents' theory, a taxpayer's right to restitution of taxes exacted in violation of the federal Constitution would be entirely dependent on state law. But "the right to recover taxes illegally collected" under federal law cannot be "unduly circumscribed by state law." *Jackson County* v. *United States*, 308 U.S. 343, 350-351 (1939), citing *Ward* v. *Love County*, 253 U.S. 17 (1920), and *Carpenter* v. *Shaw*, 280 U.S. 363 (1930); see also *District of Columbia* v. *Thompson*, 281 U.S. 25, 31 (1930) (citing *Ward* for the principle that "no statute is required to impose upon the

Contrary to the State's apparent assumption, petitioners' refund claim relies principally on Article 16, Section 13 of the Arkansas Constitution, which provides a refund remedy for "illegal exactions." See J.A. 22; Pet. Br. 38. This provision gives petitioners a state cause of action to recover the unlawful HUE taxes and obviates the need for them to proceed directly under the Constitution. Furthermore, it is beyond dispute that this state law remedy authorizes the refund of state taxes illegally exacted in violation of the Commerce Clause, because the Arkansas Supreme Court ordered that petitioners be given a refund of all HUE taxes paid after August 14, 1987, the date of Justice Blackmun's escrow (Pet. App. 5a). If Arkansas were correct that there is no cause of action to obtain refunds "when a state tax law is struck down under the negative Commerce Clause" (Ark. Br. 28), there would have been no legal basis for these refunds. Arkansas never confronts this fatal flaw in its position.

As the case comes to this Court, therefore, it must be assumed that state law authorizes the refund of taxes "illegally exacted" in violation of the Commerce Clause and that petitioners would be entitled to recover the illegal HUE taxes if *Scheiner* is retroactive. See note 8, *supra*. In that posture, the retroactivity issue is squarely presented.

2. Arkansas and all but one of its *amici* agree that the retroactivity of *Scheiner* is a question of federal law. However, *amici* National Conference of State Legislatures, *et al.* (NCSL), assert that state rather than

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city a legal obligation to make restitution" of money held "in its treasury * * * which it has no right in equity, good conscience, or common honesty to retain"). Thus, as this Court explained in *Montana Nat'l Bank* v. *Yellowstone County*, 276 U.S. 499, 504-505 (1928), a taxpayer

> cannot be deprived of its legal right to recover the amount of the taxes unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.

federal law should govern the retroactivity of a federal constitutional decision of this Court where, as here, it arises in the course of a tax refund proceeding in state court. We doubt that this contention may properly be interjected at this stage of the case. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981).

In any event, NCSL's claim cannot be taken seriously. No doctrinal support is offered for the novel and counter-intuitive proposition that the retroactivity of this Court's constitutional rulings should vary from state to state and context to context. Under NCSL's theory, *Scheiner* could, for instance, be retroactive in Vermont but not in Arkansas, or it could be governed by federal law in a criminal prosecution for nonpayment of taxes (see NCSL Br. 11-12 & n.8) but not in a civil suit to recover the same taxes.[11]

In light of these difficulties, it is hardly surprising that NCSL is unable to cite a single case involving the retroactivity of this Court's decisions in which a state court has held that the issue is controlled by state rather than federal law. Indeed, this Court itself has decided retroactivity issues as matters of federal law in both civil and criminal cases from state courts. See, *e.g.*, *Reed* v. *Campbell*, 476 U.S. 852 (1986); *Griffith* v. *Kentucky*, 479 U.S. 314 (1987). See also *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 362 (1984), which holds that the collateral estoppel effect to be given the Court's constitutional decisions in a state court proceeding raises "federal issues" that serve to prevent "a state court [from] disregard[ing] a federal constitutional ruling of this Court."

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[11] The authorities relied on by NCSL are plainly inapposite. *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), involved the retroactivity of a ruling of *state* law, not a federal rule. See also *Wainwright* v. *Stone*, 414 U.S. 21 (1973) (same). As the Court explained in *Lemon II*, 411 U.S. at 200 n.2, "*Sunburst* does not, of course, suggest that we may ignore constitutional interests in deciding whether to attach retrospective effect to a constitutional decision of this Court."

The Court has repeatedly applied the same principles in the context of the retroactivity of decisions invalidating state taxes under the Commerce Clause. Thus, in several recent state tax cases, the Court has left questions concerning retroactivity and refunds to the state courts "*in the first instance*," since "the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 277 (1984) (emphasis added). See also *Tyler Pipe Indus.* v. *Wash. Dep't of Revenue*, 107 S.Ct. 2810, 2823 (1987). This language (which NCSL curiously omits from its quotes) refutes the state law assertion; if NCSL's claim were correct, the Court could not have treated the remand in *Bacchus* and other cases as a discretionary matter, as it plainly did, but instead would have been obligated to remand for the state courts to have the final (not just the first) word on retroactivity.

The equal protection cases cited by NCSL (Br. 17, 24-25) and Florida (Br. 9-15) are also wide of the mark. Those cases do hold that it is for the state to decide whether to redress unconstitutional underinclusiveness by extending the benefits to the disfavored class or withdrawing them from the favored class (subject, however, to federal review of the adequacy of the means chosen). But they most assuredly do *not* hold that the state may confine itself to a prospective remedy, which "would not relieve the harm inflicted during the time" the discriminatory provision was in effect (*Bacchus*, 468 U.S. at 267 n.7). See also *Montana Nat'l Bank* v. *Yellowstone County*, 276 U.S. 4[illegible], 504-505 (1928) (a prospective correction "does not cure the mischief which had been done under the earlier construction"). To the contrary, the Court has never even remotely suggested that the provision of a prospective remedy would obviate retrospective relief necessary to correct past discrimination; a state that denied benefit payments to blacks or women could not avoid make-whole compensation simply

because it agreed to refrain from such treatment in the future.[12]

Finally, it is clear—and NCSL does not dispute—that the Arkansas Supreme Court applied this Court's *Chevron* test in this case. That ruling contains "no state-law overtones that, by any stretch of the imagination, could serve to insulate the case from review here." *Limbach*, 466 U.S. at 361-362. Indeed, even had the court below viewed the retroactivity question as a matter of state law that was influenced by its construction of the *Chevron* test, this Court still would have jurisdiction to review the judgment below. See *Three Affiliated Tribes* v. *Wold Engineering*, 467 U.S. 138, 152 (1984); *Delaware* v. *Prouse*, 440 U.S. 648, 652-653 (1979); R. Stern, E. Gressman, & S. Shapiro, SUPREME COURT PRACTICE 172 (6th ed. 1986) ("the Court may pass on the federal question that has been incorporated in the state law"). See also *Wold Engineering*, 467 U.S. at 158 n.16 ("uncertainty about the federal basis for the state-law decision is properly resolved in favor of the conclusion that federal law played a material role"). Accordingly, even under the theory put forward by NCSL, review in this case would be proper.

II. *SCHEINER* SHOULD BE GIVEN FULL RETROACTIVE APPLICATION

When Arkansas finally turns to the question whether the Commerce Clause principles announced in *Scheiner* should govern taxes collected for highway use between the time this suit was brought and the time *Scheiner* was decided, it entirely ignores our argument (Br. 12-13, 16, 32-33) that *Chevron* must be applied in light of the considerations set forth in *Owen* v. *City of Independ-*

[12] In theory, if it were possible to do so, Arkansas might be entitled to remedy the past discrimination by retroactively increasing the HUE tax on in-state truckers who benefited from the flat tax feature. But the State has never suggested this remedy, and it is unlikely that it could in fact be implemented.

ence.[13] Beyond that, the State's proposed application of the *Chevron* test misconceives the underlying purposes of the retroactivity doctrine and would impair rather than further basic Commerce Clause policies.

A. Foreseeability And Justifiable Reliance

Arkansas and its *amici* completely disregard the strong presumption that judicial decisions are to be applied retroactively, proposing instead a test that would turn that well-settled principle on its head. In their submission, the first prong of the *Chevron* test would, as a practical matter, be satisfied whenever the outcome of the case allegedly establishing a "new" rule could not have been predicted with reasonable assurance. This would strip most decisions of this Court of retroactive effect.[14]

[13] *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), is not to the contrary. In holding that punitive damages may not be imposed on a municipality under 42 U.S.C. § 1983, the Court specifically distinguished *Owen* on the ground that because punitive damages represent "a windfall to a fully compensated plaintiff, * * * there is no question here of equitably distributing the losses resulting from official misconduct" (453 U.S. at 267). Nor can it be said, as it was in *Fact Concerts* with regard to punitive damages, that the burden of a refund in this case would fall on "blameless or unknowing taxpayers" (*ibid.*). Here, the HUE tax unjustly enriched local taxpayers, and refunds can be financed by a nondiscriminatory tax that redistributes the burden more equitably.

[14] *Solem* v. *Stumes*, 465 U.S. 638 (1984), which respondents quote (Br. 30), does not help them. The Court there refused to apply a new rule in a collateral attack on a final judgment. By contrast, the issue here is not whether *Scheiner* would justify reopening a final decision, but whether the correct rule of law should be applied to a *pending* case. Significantly, the very rule that the Court refused to apply retroactively in *Stumes* was applied retroactively to cases still pending on direct appeal in *Shea* v. *Louisiana*, 470 U.S. 51 (1985).

Nor does the language of the *Lemon II* plurality justify nonretroactivity here. That opinion expressly disclaimed allowing "state officers to proceed with their business regardless of serious constitutional questions concerning state legislation" (411 U.S. at 208 n.8). What is more, *Lemon II* specifically concluded that the protection of reasonable reliance interests in that case (which, we note, were those of innocent third parties, not the state that had

In addition to this erroneous legal standard, the State also largely ignores the implications of the opinion in *Scheiner* itself, which, as we showed (Br. 21-24), treated its ruling as a logical and necessary application of Commerce Clause principles firmly established prior to enactment of the HUE tax. The Court's analysis of its precedents and their application to flat highway taxes is not in any way altered by the views expressed in the dissenting opinions.

Notwithstanding *Scheiner*'s reliance (107 S.Ct. at 2844) on the principle expressed in *Commonwealth Edison* that the *measure* of a tax must be tied to the extent of the taxpayer's in-state activities, Arkansas boldly asserts (Br. 31) that *Commonwealth Edison* actually supported the validity of flat highway taxes because the Court's opinion "put to one side" cases involving user fees and stated that such taxes "'cannot be tested by standards which generally determine the validity of [general revenue] taxes'" (453 U.S. at 621, 622 n.12). Pennsylvania made precisely the same argument in *Scheiner*, and it is no more availing here than it was there. As ATA explained in its reply brief in *Scheiner* (at 10-11), the clear import of footnote 12 of *Commonwealth Edison* was not the patently untenable proposition that user fees need not be fairly related to use, but rather the point that user charges are subject to an *additional* requirement of non-excessiveness that is inapplicable to general revenue taxes like Montana's severance tax.

Arkansas, like Pennsylvania in *Scheiner*, also seeks (Br. 31 & n.24) to draw support from the Court's

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violated the First Amendment) would "not substantially undermine the constitutional interests at stake in *Lemon I*" (*id.* at 201). This limitation on the Court's ruling is underscored by the subsequent decision in *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977), which declined to follow *Lemon II*; as the Court explained, "[n]othing in *Lemon II* * * * suggests * * * a broad general principle * * * that every such unconstitutional statute, like every dog, gets one bite, if anyone has relied on the statute to his detriment" (*id.* at 130).

citation to the old flat tax cases in *Massachusetts* v. *United States*, 435 U.S. 444, 463-464 (1978). But that case involved neither state taxes nor the Commerce Clause and referred to *Aero Mayflower* only by way of analogy—indeed, the majority in *Scheiner* did not consider it sufficiently material to discuss (compare 107 S.Ct. at 2849 (O'Connor, J., dissenting)). Significantly, because the tax challenged in *Massachusetts* was imposed by the federal government, there was no risk of cumulative tax burdens and no danger that taxpayers would suffer discrimination at the hands of a government in which they had no voice. Thus, nothing in *Massachusetts* rehabilitated flat taxes from the fatal implications of *Complete Auto* and *Commonwealth Edison*.[15]

Nor is the vitality of *Aero Mayflower* shored up by the claim (see Ark. Br. 32) that the Court had not used the phrase "internal consistency" before 1983. First, *Scheiner* rested not only on the concept of internal consistency but equally on the existence of actual discrimination against out-of-state truckers (see 107 S.Ct. at 2836, 2841, 2847)—a clear Commerce Clause violation under principles settled by the earlier cases, such as *Boston Stock Exchange*, 429 U.S. 318 (1977), on which *Scheiner* relied. Indeed, in citing (Br. 32) Professor Hellerstein's article, Arkansas fails to note his comment that "the commerce clause concerns of discrimination and multiple tax burdens that the Court addressed with the aid of the 'internal consistency' principle in * * * *Scheiner* could as easily have been dealt with by a rigor-

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[15] Especially insupportable is Arkansas' suggestion (Br. 26 n.18) that Congress somehow approved "flat taxes such as those at issue here." The quoted House Report was issued in June 1980, before a single one of the flat highway taxes that have been the subject of *Scheiner* and related litigation was in force (only trivial flat decal fees of two or three dollars existed at the time). These legislative materials were called to the Court's attention in *Scheiner* but were not found persuasive; they are even less relevant to the retroactivity issue here.

ous application of traditional apportionment principles." 87 Mich. L. Rev. at 177.

B. Furtherance Of Commerce Clause Policies

We argued in the opening brief (at 27-33) that retroactive application of *Scheiner* would advance the policies of the Commerce Clause both by restoring in-state and interstate commerce to a plane of equality and by supplying needed incentives to state and local governments to resist the temptation to engage in discriminatory taxation. The State responds by asserting (Br. 32-34) that tax refunds would not cure any past adverse effects on commerce of the HUE tax, that the tax never in fact deterred truckers from operating in Arkansas, and that the conduct of the Arkansas legislature and courts in adopting and perpetuating the HUE tax reveals satisfactory compliance with national free trade interests.

The State's argument stubbornly ignores the systemic consequences of a regime in which the invalidation of unconstitutional (but politically popular) taxes is limited to prospective effect. Without the availability of a refund remedy, aggrieved taxpayers would be doubly discouraged from engaging in interstate commerce: not only would they have to bear the discrimination during the pendency of litigation, but even if they prevailed they would never be able to recover the amounts wrongfully taken from them. Thus, an *ex ante* rule that retroactive refund relief is generally unavailable would frustrate what Arkansas itself describes (Br. 32) as the primary purpose of the Commerce Clause: "to prevent commerce among the States from being deterred." [16]

[16] In this connection, it is hard to take seriously Arkansas' suggestion (Br. 33) that interstate commerce is not burdened by the economic impact of a seriously discriminatory tax if the benefit of the activity being taxed—operating in Arkansas at the national norm of 80,000 pounds rather than having to skirt the State—exceeds the amount of the tax (see also Ark. Br. 38-39). This formulation would lead to the conclusion that discriminatory taxation of interstate commerce need hardly ever be of concern, since it is rare indeed that the level of any tax is so high as to confiscate the entire value of the taxed activity.

We leave it to the Court to determine from the history of this case whether Arkansas authorities—legislative, executive, and judicial—acted with due regard for the interests protected by the Commerce Clause. Even if they did, that hardly refutes the logic (or practicality) of our point that—in the generality of situations—state authorities should appreciate that they cannot count on retaining the benefits to local taxpayers inherent in enactment of parochial, discriminatory tax legislatation. See McKesson Br. 15 (statement of Florida legislator).

C. Showing Of Inequity

It is the State's burden to show that retroactive application of *Scheiner* would produce "'substantial inequitable results'" entailing "'injustice or hardship'" (*Chevron*, 404 U.S. at 107). Its effort to do so (Br. 34-41) reflects a profound misunderstanding of the facts and law underlying both *Scheiner* and the instant case—beginning with its attempt to shift the burden of showing inequity to petitioners. Significantly, although the third prong of the *Chevron* test focuses on the hardship to the proponent of non-retroacitvity, Arkansas nowhere argues that the payment of refunds would seriously strain the State's treasury or disrupt its highway programs; for the reasons discussed in our opening brief (at 35-38), such a claim would not be sustainable.

1. Arkansas' principal argument on the equities (Br. 34-38) appears to be that the HUE tax caused no actual discrimination against the members of the plaintiff class and that the same was true of the axle tax considered in *Scheiner*, which, according to Arkansas (Br. 38), was not invalidated because actually discriminatory. The decision of the Arkansas Supreme Court certainly did not rest on any such supposition; to the contrary, the opinion noted (Pet. App. 2a) that "[i]t is conceded that the HUE tax effectively costs other truckers more per mile

than it costs those based in Arkansas * * *." Even were it appropriate to reconsider the finding in this forum, the State has offered no acceptable justification for overturning it.[17]

Arkansas makes the baffling assertion that because the original group of plaintiffs was divided into two subclasses, Arkansas base-registered and non-Arkansas base-registered, this case involves no claim that the discrimination favors Arkansas *intra*state truckers at the expense of interstate operators.[18] It is true that, because of the readier availability of data (see R. 1597-1598), petitioners' evidence in the trial court compared Arkansas and non-Arkansas interstate operators. It is manifestly untrue, however, that the right to operate unlimited miles on the State's highways for a flat $175 annual fee did not discriminate in favor of those who

[17] Arkansas challenges (Br. 5 n.3, 35 n.32) the adequacy of ATA's study showing a discrimination of more than 3:1 against out-of-state trucks. But as we have previously explained in more detail (see J.S. 4, *ATA* v. *Gray*, No. 86-358), the record in this case sufficed to prove the 3:1 figure, which was corroborated by the State's own calculations showing that out-of-state trucks paid a per-mile HUE tax that was 320% of that paid by Arkansas-based trucks. (In fact, it seems virtually certain that the survey data substantially *understate* the extent of the discrimination by omitting Arkansas intrastate operators, who, because they conducted all of their operations on Arkansas highways, were necessarily the greatest beneficiaries of the flat feature of the HUE tax (see note 19, *infra*).) Indeed, not only the Arkansas Supreme Court but the Chancery Court (J.A. 27) and Justice Blackmun (Pet. App. 11a) all concluded that the HUE tax actually discriminated to a substantial extent against non-Arkansas truckers, and the State has provided no basis to reject those conclusions here. See also *Scheiner*, 107 S.Ct. at 2841 (flat highway taxes result in actual and substantial discrimination against out-of-state taxpayers).

[18] The State fails to note that the challenge to the flat aspect of the HUE tax (Count I of the complaint) was brought only by the non-Arkansas subclass (see J.A. 14-16). The Arkansas-carrier subclass advanced or joined in other claims that are no longer part of this case (J.A. 16-17). Thus, the State is clearly mistaken in suggesting (Br. 36) that petitioners' grievance involves solely an internal dispute within the class of challengers to the HUE tax.

surely drove the *most* miles in the State—the purely intrastate operators.[19] The record thus forecloses acceptance of Arkansas' invitation to assume that the tax caused no actual discrimination against interstate commerce.

In asking this Court to overturn the findings below that the HUE tax actually discriminates against out-of-state trucks, the State also asserts (Br. 36-37 & n.36) that trucks generally do not travel more miles in the state in which they are base-registered than in other states and that this is shown by *Scheiner* itself.[20] But neither *Scheiner* nor anything else adduced by the State supports this erroneous contention. Central to the determination of discrimination in *Scheiner* was the fact that the average Pennsylvania-registered vehicle drove five times as many miles for its tax dollar as the average non-Pennsylvania vehicle (see 107 S.Ct. at 2836, 2841).[21] This discrimination inheres in flat highway

[19] The State's assertion (Br. 36 n.33) that it is "unknowable" whether intrastate truckers were favored by the HUE tax is poppycock. According to the Federal Highway Administration, the typical truck subject to the HUE tax travels about 70,000 miles per year (J.A. 63). Even supposing that Arkansas intrastate trucks operated just half that much, their per mile HUE tax cost would be 0.5¢, less than one-sixth the 3.2¢ per mile average cost for petitioners—a figure accepted by the State's own expert witness (J.A. 69).

[20] The State seeks to support this argument with the claim (Br. 35) that the state of base-registration is irrelevant because the IRP allows interstate carriers great flexibility in selecting where to register their vehicles. This contention invites the Court to disregard the most flagrantly discriminatory aspect of the tax—the benefits conferred on Arkansas *intra*state operators—and ignores the fact that Pennsylvania too was a member of the IRP, so that interstate carriers based in that State presumably had the same flexibility of registration.

[21] Arkansas' assertion (Br. 37 n.36) that the Court's references to a 5:1 discrimination in *Scheiner* related solely to the marker fee is indefensible. The decision speaks unambiguously of "*each* of the flat taxes" (107 S.Ct. at 2836; emphasis added) and specifically describes data showing the discriminatory impact of the *axle tax* in footnote 10 and the accompanying text, which Arkansas fails to cite.

taxes, which by their nature benefit frequent users of the taxing state's highways at the expense of less frequent users, and it lies at the heart of the ruling in *Scheiner*.[22]

Arkansas next attempts (Br. 37-38) to resurrect the argument made by Pennsylvania in *Scheiner* that any discrimination is offset by the higher registration fee per mile paid by in-state trucks. But the answer given in *Scheiner* is equally apt here: a discriminatory flat tax "cannot be vindicated as a 'rational restructuring of burdens' simply because it arguably benefits a class of truckers that pays more [in registration fees] to use the State's highways than does another class of highway users" (107 S.Ct. at 2843). As the Court correctly understood, registration fees, by virtue of the IRP and reciprocity agreements, do not discriminate against out-of-state carriers or impose cumulative burdens on interstate commerce (see *id.* at 2834, 2840, 2842-2843); thus they are simply irrelevant to the validity of flat taxes that do entail such discrimination and burdens.[23]

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[22] The State apparently has been confused (see Br. 37 n.36) by the Court's observation in *Scheiner* that "out-of-state vehicles and in-state vehicles subject to the axle tax traveled approximately the same number of miles on Pennsylvania's highways" (107 S. Ct. at 2836). Arkansas overlooks the fact that there were many more out-of-state than in-state trucks, so that the average Pennsylvania mileage per truck was much higher for the Pennsylvania-based carriers. The manifest discrimination against out-of-state trucks is shown by the Court's statement immediately following the above quotation that "less than 1/6 of the State's total axle tax revenues were generated by Pennsylvania based vehicles" (*ibid.*).

[23] Furthermore, the per-mile registration fee figures and the accompanying hypothetical offered by Arkansas (Br. 37-38 & n.38) are quite misleading. They are predicated on the unsubstantiated and erroneous supposition (see J.A. 63-66) that Arkansas and non-Arkansas trucks will operate a *different* number of total miles. In part because of the IRP, however, trucks operating the *same* number of total miles will have the same Arkansas per-mile registration fee cost, regardless of what proportion of their total miles is in Arkansas.

2. It is likewise irrelevant that we do not challenge the HUE tax as excessive and that out-of-state trucks derived benefit from Arkansas' expenditures for highway maintenance (see Ark. Br. 38-39).[24] The constitutional vice in flat taxes is discrimination, not excessiveness. The problem in this case, as in *Scheiner*, is that out-of-state truckers were being made to pay for most of the wear and tear caused by in-state trucks. Significantly, the State is unable to offer any response to the football game hypothetical in our opening brief (at 39-40), which reveals the logical flaw in its position.[25]

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[24] The State frequently predicates its arguments on factual assertions that have only the most tenuous record basis and were not found as facts by the Arkansas courts. For example, on the question of added highway maintenance necessitated by trucks weighing between 73,280 and 80,000 pounds, respondents repeatedly (Br. 4, 12, 39, 41) claim an annual cost of $53 million. ATA's record evidence, however, stated the correct figure to be as low as $8 million (see J.A. 151). While the cost to the State should be wholly irrelevant to this discrimination case, the Court should not in any event rest its decision on the State's controverted figure.

[25] The State insinuates (Br. 39) that petitioners suffered no injury from the HUE tax because they "could and apparently did" pass the expense on to their customers through ICC tariffs. That claim was neither raised below nor relied on by the Arkansas Supreme Court. It rests entirely on a few lines of testimony about what one specific trucker might seek to do in the future, with not so much as an iota of evidence that any trucker ever actually "passed on" any part of the HUE tax. This argument is simply too little and too late. Furthermore, it is far from clear, as a matter of either economics or common sense, that a "pass on" defense should be allowed in the case of a tax that is not separately stated or imposed on customers in individual transactions—as distinguished from, *e.g.*, a sales tax. Nor is it clear whether or to what extent the highway tax could be passed on by truckers, which much compete with other modes of transportation that were not subject to the tax, or what amount of business truckers would lose as a result. Finally, we note that in the two states where this "pass on" defense was properly raised in connection with flat highway taxes, it has been rejected as a defense to a retroactive refund remedy. See *ATA* v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶ 200-287 (Vt. Super. Ct., Wash. Co., May 4, 1987); *ATA* v. *Kline*, No. 07-14-

3. Arkansas next suggests (Br. 39-40) that refunds should be denied because of the "intolerable" administrative burdens associated with implementing a remedy involving partial refunds. That concern—on which the Arkansas Supreme Court did not rely—has little if anything to do with the "substantial inequity" prong of *Chevron*. And, of course, there would be no administrative inconvenience associated with implementing the remedy of full refunds apparently provided by Arkansas law when taxes have been "illegally exacted."

Even if the refunds were confined to the "discrimination component" of petitioners' tax payments, administering them would not prove unmanageable. For example, calculation of the amount by which the category of out-of-state truckers (with an average rate of 3.2¢/mile) paid more than in-state truckers (an average of 1¢/mile) would not be difficult. Even a more individualized computation would be facilitated by the existence of fuel tax records, which show annual Arkansas mileage for each interstate trucker, and by the survey data already in the record. The task would be no more difficult than in many other class actions that produce common funds that must be shared among class members who have suffered injuries of somewhat varying amounts. And even if the refund process were to prove more complex than it appears, that would afford no equitable ground for denying relief altogether.

4. Finally, a word is in order about the crocodile tears Arkansas sheds (Br. 12, 40) over the burdens that might be imposed on interstate commerce by the taxes it would adopt to cover any refund obligation arising from this litigation. This argument conveniently overlooks the fact than any such taxes would have to be nondiscriminatory; for the out-of-state truckers previously discriminated against, any tax increase would be more than offset by the refunds they would receive; and while the heavier

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1667-85 MVT (N.J. Tax Ct. Sept. 8, 1988) (copy lodged with Clerk of this Court).

users of Arkansas' highways (mostly Arkansas-based) might have to pay higher taxes, the amount would not exceed that necessary to remove the financial advantage they previously enjoyed. Beyond that, the State totally ignores the fact that a variety of means exist to ameliorate the impact of the refunds—such as use of long-term bonds or payment of the refunds in installments over several years. See Pet. Br. 37-38.

III. TAXES FOR THE POST-*SCHEINER* YEAR SHOULD BE REFUNDED

Arkansas does not dispute that a prospective decision normally becomes effective on the date it is announced. Nor does it dispute that the critical event here in giving prospective application to *Scheiner* is the use of the State's highways, not the actual payment of the tax. Thus, unless the effectiveness of *Scheiner* could properly be suspended past June 23, 1987, it is conceded that all HUE taxes paid for use of Arkansas' highways during the 1987-1988 tax year (which began on July 1, 1987) would be subject to refund regardless of when paid.

Significantly, the State does not defend the rationale of the Arkansas Supreme Court that *Scheiner* took effect on August 14, 1987, when Justice Blackmun's escrow order explicitly indicated the probable invalidity of the HUE tax. Rather, under the State's theory, the HUE tax apparently did not become unconstitutional either until "the state legislature [had] time to reassess its tax structure in light of *Scheiner*" (Ark. Br. 42), which was October 9, 1987, or "until the state court concluded its deliberations" (*id.* at 41) on the validity of the HUE tax, which was March 14, 1988.[26] In either event, the

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[26] Little credence can be given to the claim (Ark. Br. 42) that the prompt invalidation of the HUE tax would have eliminated the authorization for heavy trucks to use Arkansas' roads. For one thing, Arkansas Highway Department regulations gave trucks until August 31, 1987, to be qualified for the July 1987-June 1988 tax year (HUE Tax Rules and Regulations, § V(1) (April 30, 1984)), so it is difficult to see what basis there would have been to ban highway use before that date. Moreover, such a ban would have jeopardized

State does not defend the judgment below, and its argument does not account for the return of the post-August 14 escrowed funds.

For all its protestations of uncertainty, the State makes no showing, nor could one sensibly be made, that there was the slightest doubt about the invalidity of the HUE tax in the wake of *Scheiner*. This Court would send a most unfortunate message to state and local governments if it held that they are free to continue to enforce plainly unconstitutional measures until it is convenient to formulate an alternative course of action. (We note that the NCSL and Arkansas' other *amici* do not support this aspect of its argument.) This case would be an especially unsuitable one for such action in view of the delay and obstruction that stalled relief on remand, described in our opening brief (at 4-6, 43-44).

It should be remembered, in this connection, that the issue here is not whether to punish state officials for any delay in implementing the principles of *Scheiner*, but rather whether to restore to petitioners that which was unconstitutionally taken from them. Arkansas was free to take as long as it reasonably needed to replace the HUE tax, but it should not be free to retain the taxes unlawfully exacted in the interim.[27]

The cases on which Arkansas relies (Br. 43) bear no similarity to the present situation and merely evidence the weakness of the State's position.[28] In *Northern Pipe-*

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the State's right to receive federal highway funding. Under the circumstances, this Court can be quite confident that, if the need had arisen, the offensive provisions of the statute would have been severed and the authority to operate at 80,000 pounds preserved.

[27] In contrast to the position taken here by Arkansas, New Jersey acknowledged in its flat tax case that post-*Scheiner* taxes had to be refunded. See *Kline*, slip op. 2.

[28] The State's discussion (Br. 43) of *Burlington Northern* neglects to mention that the prior tax regime that Congress altered was not unconstitutional. In such a case, there would of course be no objection to delaying the new scheme for whatever length of time seemed convenient.

line and *Buckley* this Court postponed the effective date of its own decision, and it did so by entering a stay of its judgment. It is one thing for this Court to have such authority, but it is an entirely different matter—and one that raises disturbing implications for our national judicial system—to have the same power vested in hundreds of state and lower federal courts around the country. Furthermore, those cases involved essentially procedural issues and did not countenance continuing infractions of substantive rights. In addition, the Court's action in each case was necessary to protect the rights and reliance interests of innocent third parties, not, as here, those of the very party whose conduct violated the Constitution. Finally, the exercise of such authority, even by this Court, has been and must continue to be confined to truly extraordinary circumstances rising to the level, for example, of the inability of the judicial system to adjudicate legal claims or the invalid composition of an entire agency of government. Nothing even remotely comparable is present here.

Respectfully submitted.

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APPENDIX

The Court has entered judgment on the merits in a large number of tax refund actions coming from state court in which, under respondents' theory of the Eleventh Amendment, the Court lacked jurisdiction to adjudicate the federal question brought before it for review. The cases listed are ones in which the plaintiff could have received only retrospective monetary relief because the tax had been repealed, or in which the case was described by this Court as being for refunds of past taxes paid under protest, with no indication that the taxpayer also sought prospective relief.

Texas Monthly, Inc. v. *Bullock*, No. 87-1245 (Feb. 21, 1989)

Shell Oil Co. v. *Iowa Dep't of Revenue*, 109 S.Ct. 278 (1988)

Western Air Lines, Inc. v. *Board of Equalization*, 107 S.Ct. 1038 (1987)

Williams v. *Vermont*, 472 U.S. 14 (1985)

Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263 (1984)

Aloha Airlines, Inc. v. *Director of Taxation*, 464 U.S. 7 (1983)

Container Corp. v. *Franchise Tax Board*, 463 U.S. 159 (1983)

Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1983)

Minneapolis Star & Tribune Co. v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983)

Western & Southern Life Ins. Co. v. *Board of Equalization*, 451 U.S. 648 (1981)

White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980)

Central Machinery Co. v. *Arizona State Tax Comm'n*, 448 U.S. 160 (1980)

Heublein, Inc. v. *State Tax Comm'n*, 409 U.S. 275 (1972)

American Oil Co. v. *Neill*, 380 U.S. 451 (1965)

Department of Revenue v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964)

Halliburton Oil Well Cementing Co. v. *Reily*, 373 U.S. 64 (1963)

State Board of Insurance v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962)

Laurens Fed. S&L v. *South Carolina Tax Comm'n*, 365 U.S. 517 (1961)

Memphis Steam Laundry Cleaner, Inc. v. *Stone*, 342 U.S. 389 (1952)

Freeman v. *Hewit*, 329 U.S. 249 (1946)

Richfield Oil Corp. v. *Board of Equalization*, 329 U.S. 69 (1946)

Lincoln National Life Ins. Co. v. *Read*, 325 U.S. 673 (1945)

International Harvester Co. v. *Ind. Dep't of Treasury*, 322 U.S. 340 (1944)

Best & Co. v. *Maxwell*, 311 U.S. 454 (1940)

Tradesmens National Bank of Oklahoma City v. *Oklahoma Tax Comm'n*, 309 U.S. 560 (1940)

Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939)

Welch v. *Henry*, 305 U.S. 134 (1938)

Western Live Stock v. *Bureau of Revenue*, 303 U.S. 250 (1938)

Connecticut General Life Ins. Co. v. *Johnson*, 303 U.S. 77 (1938)

Ryan v. *Washington*, 302 U.S. 186 (1937)

Atlantic Refining Co. v. *Virginia*, 302 U.S. 22 (1937)

New York ex rel. Cohn v. *Graves*, 300 U.S. 308 (1937)

New York ex rel. Whitney v. *Graves*, 299 U.S. 366 (1937)

Norfolk & Western Ry. Co. v. *North Carolina ex rel. Maxwell*, 297 U.S. 682 (1936)

Federal Compress & Warehouse Co. v. *McLean*, 291 U.S. 17 (1934)

Pacific Co. v. *Johnson*, 285 U.S. 480 (1932)

Hoeper v. *Tax Commission*, 284 U.S. 206 (1931)

Carpenter v. *Shaw*, 280 U.S. 363 (1930)

MacAllen Co. v. *Massachusetts*, 279 U.S. 620 (1929)

National Leather Co. v. *Massachusetts*, 277 U.S. 413 (1928)

Louisville Gas & Electric Co. v. *Coleman*, 277 U.S. 32 (1928)

Swiss Oil Corp. v. *Shanks*, 273 U.S. 407 (1927)

Bass, Ratcliff & Gretton, Ltd. v. *State Tax Comm'n*, 266 U.S. 271 (1924)

Schwab v. *Richardson*, 263 U.S. 88 (1923)

New York ex rel. Clyde v. *Gilchrist*, 262 U.S. 94 (1923)

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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-325 (4)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF NATIONAL PRIVATE TRUCK COUNCIL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF NATIONAL PRIVATE TRUCK COUNCIL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 36.2 of the Rules of this Court and with the accompanying writtten consents of the parties, National Private Truck Council, Inc. ("NPTC") submits this brief as amicus curiae in support of petitioners, and urges the Court to reverse the decision of the Arkansas Supreme Court.

THE INTERESTS OF AMICUS CURIAE

NPTC is a national association of private motor carriers. Private motor carriers are companies which own and operate trucks in furtherance of their own non-transportation business, as distinguished from "for-hire" carriers, which carry goods for others for compensa-

tion and whose principal association is petitioner American Trucking Associations, Inc.[1] Private carriers constitute the largest segment of the interstate trucking industry; in 1986 they accounted for approximately 67 percent of the heavy trucks (over 26,000 pounds) operated by commercial enterprises in the United States.[2] Most private carriers not only operate their own truck fleets but also employ the services of for-hire carriers, and are thus engaged in interstate commerce as both carriers and shippers.

NPTC was formed on October 1, 1988 as a result of the merger of two associations representing private carriers, the Private Truck Council of America, Inc. and the National Private Trucking Association, Inc. As a result of that merger NPTC is the only national association devoted exclusively to the interests of private carriers. NPTC has more than 2,500 member and associate member companies; these members represent an extremely broad range of companies whose businesses are critically dependent on interstate truck transportation.

NPTC and its members have a vital interest in the issues presented in this case. Many of NPTC's members are companies who were subject to and who paid Arkansas' Highway Use Equalization (HUE) Tax. They are thus members of the plaintiff class and have a direct monetary interest in the outcome of this case. More generally, discriminatory state transportation taxes like Arkansas' HUE tax impose an enormous burden on NPTC's members, and removing that burden is one of NPTC's most important objectives.

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[1] While for-hire carriers operating in interstate commerce must first obtain operating authority from the Interstate Commerce Commission, private carriers are exempt from ICC regulation. 49 U.S.C. § 10524.

[2] U.S. Congress, Office of Technology Assessment, *Gearing Up For Safety: Motor Carrier Safety in a Competitive Environment*, OTA-SET-382 (U.S.G.P.O. 1988), p. 34.

To that end NPTC and its predecessors have taken an active role in challenging state motor carrier taxes that discriminate against interstate commerce. In 1984 the Private Truck Council of America, Inc. ("PTCA") succeeding in obtaining a judgment by the Supreme Court of Indiana striking down an Indiana property tax levied on vehicles engaged in interstate commerce. *Huie v. Private Truck Council of America, Inc.*, 466 N.E.2d 435 (Ind. 1984). In 1986 PTCA successfully challenged a Louisiana fee imposed only on private carriers operating in interstate commerce in Louisiana and registered in other states. *Private Truck Council of America, Inc. v. Louisiana*, No. 289, 481 (19th Judicial Dist. Ct. East Baton Rouge Parish; judgment entered Jan. 29, 1986). In 1986 and 1988 PTCA also obtained favorable judgments from the Supreme Courts of Maine, New Hampshire, New Jersey and Georgia and from the First District Court of Appeal of Florida, invalidating so-called "retaliatory taxes" which were imposed by those states only on carriers whose vehicles are registered in certain other states and which were enacted specifically to retaliate against Arkansas' HUE tax and similar taxes enacted by other states. *Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214 (1986), *cert. denied*, 476 U.S. 1129 (1986); *Private Truck Council of America Inc. v. State of New Hampshire*, 517 A.2d 1150 (N.H. 1986); *Private Truck Council of America, Inc. v. New Jersey*, 111 N.J. 214, 544 A.2d 33 (1988); *Private Truck Council of America, Inc. v. Georgia*, 258 Ga. 531, 381 S.E.2d 378 (1988); *Private Truck Council of America Inc. v. Florida Department of Revenue*, 531 So.2d 367 (Fla. App. 1988). Suits challenging similar retaliatory taxes imposed by Oklahoma and Nebraska are still pending. NPTC intends to continue to monitor state taxes and fees closely and to challenge those it believes to be unconstitutional.

The issues presented in this case are present in every suit successfully challenging discriminatory state taxes

on Commerce Clause grounds, including those brought by PTCA and now maintained by NPTC. NPTC believes that enforcing an effective refund remedy in such cases is critical to achieving the basic purposes of the Commerce Clause. If the decision below is allowed to stand, it will serve to deprive NPTC's members and those engaged in interstate commerce of the very protections the Commerce Clause was adopted to provide.

STATEMENT OF THE CASE

Petitioners brought this suit in 1983 in the courts of Arkansas before the Arkansas' Highway Use Equalization (HUE) tax went into effect. At that time they sought but were denied a preliminary injunction against collection of the tax pending the outcome of the litigation (Pet. 3; Pet. App. 39a-41a). Four years later, after Arkansas had collected some $159 million in HUE taxes, the Arkansas Supreme Court sustained petitioners' claims on the merits and invalidated the HUE tax (Pet. App. 1a-3a). It did so on the basis of this Court's June 23, 1987 decision in another similar suit brought by petitioners challenging a Pennsylvania tax. *American Trucking Associations, Inc. v. Scheiner*, 107 S.Ct. 2829 (1987). With respect to petitioners' claims for refunds of the taxes collected since 1983, however, the Arkansas Supreme Court purported to apply this court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to deny refunds of all HUE taxes paid before August 14, 1987, the date that Justice Blackmun stepped in to require all taxes collected thenceforth to be held in escrow (Pet. App. 3a-5a).

SUMMARY OF ARGUMENT

Although NPTC agrees fully with petitioners' claim that the court below erred in its analysis of the *Chevron* factors as applied to the facts of this case, NPTC submits more broadly that application of the *Chevron* exception to the general rule of retroactive application is rarely, if ever, appropriate in cases involving state taxes found to discriminate against out-of-state enterprises in violation of the Commerce Clause, for the following reasons:

First, with respect to the third *Chevron* factor, NPTC submits that there are not circumstances in which "equitable" considerations would militate in favor of allowing states to retain taxes collected from a discriminated-against class of taxpayers and found invalid for that reason. Because states can always raise needed revenues through non-discriminatory taxes, there can never be any "equitable" justification for requiring the discriminated-against class and not a non-discriminatory class to bear a state's revenue burdens.

Second, in view of the nature of the Commerce Clause violation, failure to require states to return discriminatory tax payments fails to eliminate the unconstitutional burden.

Third, state court reliance on *Chevron* to avoid refunds of taxes found to be discriminatory will force interstate enterprises to seek interlocutory protection from federal courts, and will thus inevitably lead to greater federal court intrusion into state tax proceedings, contrary to congressional policy. It will also lead to greater non-compliance by taxpayers with state tax laws, which will promote inequities among taxpayers.

Finally, application of the *Chevron* analysis to this class of cases will, as this case illustrates, necessitate this Court's continued review and close scrutiny of every case

in which state courts rule in favor of their state treasuries in order to ensure that the interests of out-of-state enterprises and the policies of the Commerce Clause are properly weighed and protected.

ARGUMENT

THE *CHEVRON* EXCEPTION TO THE GENERAL RULE OF RETROACTIVE APPLICATION SHOULD NOT BE APPLIED TO DISCRIMINATORY STATE TAXATION THAT IS FOUND INVALID UNDER THE COMMERCE CLAUSE.

NPTC believes it is important to stress at the outset that the only issue presented for this Court's resolution in this case is whether the Arkansas Supreme Court correctly relied on and applied *Chevron* to deny refunds of all HUE taxes paid before August 14, 1987. There may be many other grounds on which states may appropriately deny or limit refunds of taxes found to violate the Commerce Clause or any other constitutional provision, such as statutes of limitations, requirements of proof, and so forth, the enforceemnt of which may serve legitimate state interests that are wholly unrelated to the tax at issue or its discriminatory effect. Conversely, there may be other grounds that states may invoke to deny refunds that are not constitutionally permissible.[3] This case presents no issue respecting the

[3] For example, in a number of cases brought by NPTC's predecessor, PTCA, state courts have held that state sovereign immunity barred the taxpayers' claims for refunds of taxes paid prior to the filing of the suits (*see Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); *Private Truck Council of America, Inc. v. New Hampshire*, 517 A.2d 1150 (N.H. 1986); and in a case brought by petitioner ATA against Vermont, the Vermont Supreme Court held that sovereign immunity barred refunds of all taxes paid *after* the suit was filed. *American Trucking Associations, Inc. v. Conway*, 508 A.2d 405 (Vt. 1986), *cert. denied*, 107 S.Ct. 3262 (1987). Respondents in this case have likewise argued that sovereign immunity bars all tax refunds. ATA and NPTC vigorously dispute the proposition

validity of any ground for denying or limiting tax refunds in this case other than the principles set forth in *Chevron*.

The issue presented, though limited, is an extremely important and recurring one because state courts are invoking *Chevron* with increasing frequency to deny tax refunds to victims of discriminatory taxation. As to that issue, NPTC submits that the Arkansas Supreme Court misapplied *Chevron*. NPTC believes that the considerations set forth in *Chevron* as applied to the circumstances of this case clearly militate in favor of full retroactive relief and warrant refunds of all HUE taxes paid since this suit was brought. NPTC expects that the petitioners will fully address these points and will demonstrate that the *Chevron* factors, as applied to the facts of this case, warrant full retroactive relief. NPTC will not attempt to duplicate that anticipated discussion.

What NPTC wishes to address as amicus in this brief is what it perceives to be a more fundamental problem with the *Chevron* doctrine in this class of cases, a problem that goes beyond the particular circumstances of this case and the application of *Chevron* to those circumstances. For the reasons discussed below, NPTC submits that, because of the nature of the issues and interests involved, the *Chevron* doctrine—which is an exception to the general principle that judicial decisions declaring rights have full retroactive effect—is not really appropriate at all with respect to this category of cases, involving discriminatory state taxes found to violate the Commerce Clause, and should not be applied to them. NPTC further submits that it is important for the Court to make clear that the *Chevron* exception should rarely, if ever, be applied to this category of cases. Otherwise,

that states have immunity against claims of refunds of taxes found to violate the Federal Constitution. The court below declined to reach that issue in this case, however, and it is not presented for this Court's review.

this Court will be repeatedly forced, by the very nature of the problem, to review closely each state court's application of the *Chevron* factors to the particular facts in order to ensure that the constitutional rights of interstate enterprises are protected and that the purposes of the Commerce Clause are served.

A. The Equities Should Never Favor A State's Retention Of Taxes Exacted From A Discriminated-Against Class of Taxpayers.

As the Court has frequently noted, the general rule is that judicial decisions declaring constitutional and statutory rights have retroactive effect. *See, e.g., Saint Francis College v. A-Khazraji*, 107 S. Ct. 2022, 2025 (1987). As the United States Court of Appeals for the Seventh Circuit recently observed.

> This result is due not to the myth that courts do not make, but only find, law, so that their decisions merely declare what was the law all the time, but to a sense that as between two surprised parties the burden of surprise should rest on the party who guessed wrong about the direction in which the law was moving. . . .

Equal Employment Opportunity Commission v. Vucitech, 842 F.2d 936, 941 (7th Cir. 1988).

Chevron and other cases have applied an exception to the general rule in limited circumstances where retroactive application would be inappropriate. This Court in *Chevron* identified three circumstances that would warrant limiting the effect of a decision in a civil case to prospective application: (1) where the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ;" (2) where retrospective application would retard, or would not further, the purpose and effect of the new rule, and (3)

where retoractive application " 'could produce substantial inequitable results . . .' " 404 U.S. at 106-107; quoting from *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969). Although the Court has not clearly stated whether all three circumstances must be satisfied in order to limit the effect of a decision prospectively, the fact that such a result is an exception to the general rule suggests that they must all be present.[4] Certainly there would appear to be no basis for refusing to apply the general rule of retroactivity when the third circumstance is absent—*i.e.*, when doing so would not result in any substantial inequity.

With respect to the third factor, however, NPTC submits that considerations of "equity" should never militate in favor of allowing a state to retain taxes collected from a class of taxpayers when those taxes are found invalid because they discriminated against that class. In their analyses of the equities under *Chevron*, the court below and others have relied on the fact that the state in question has critical revenue needs and has put the tax proceeds to worthy purposes, such as maintaining the highways for the benefit of all users including the discriminated-against taxpayers. Pet. App. 4a.[5]

Those facts, however, are completely irrelevant to an analysis of the competing "equities." That is so because states always have the power to raise the revenues by non-discriminatory taxes, and can do so to fund any refund liability that may be imposed. Accordingly, the question of tax refunds, *vel non*, is never a question of whether the state must bear an additional cost or forego

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[4] For example, the Court has described the first factor—that the decision established a "new principle of law"—as a "threshold" requirement for prospective application. *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982).

[5] See also, *e.g., Salorio v. Glaser*, 461 A.2d 1100, 1134 (N.J.), *cert. denied*, 464 U.S. 993 (1983).

certain revenues; in every case it is simply a question of which class of taxpayers is to bear the burden of the particular revenue need, the discriminated-against class or a broader, non-discriminatory class. Imposing new, non-discriminatory taxes may be *inconvenient* for a state, and it may be politically *unpopular*, but those are not equities that should ever militate in favor of allowing a state to retain the proceeds of discriminatory taxes.

Furthermore, for courts to attempt to weigh and compare the revenue needs of states and the worthiness of projects funded by various taxes against the interests of interstate enterprises in obtaining refunds would be a completely inappropriate basis for delineating the scope of constitutional remedies in particular cases. There is simply no principle or standard grounded in the Constitution by which courts could make such comparisons.

In short, because requiring states to refund unconstitutional taxes to a discriminated against class could never, in NPTC's submission, produce a "substantial inequitable result," application of the *Chevron* exception to this class of cases is simply inappropriate.[6]

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[6] The court below also concluded that refunds of all taxes paid by out-of-state truckers would be inequitable because such refunds would provide "an unconscionable refund far in excess of a fair recovery for what they may have suffered due to the tax." Pet. App. 5a. This observation is not relevant to an analysis of the equities under *Chevron* and does not support the judgment below; it is only relevant to the extent of the refunds that may be due to petitioners and the class of out-of-state carriers they represent. As a matter of federal constitutional law out-of-state taxpayers only have a claim to refunds of discriminatory taxes to the extent the taxes had a discriminatory impact on them, and petitioners have never contended otherwise. (What they contended below is that they have a right under *state* law to refunds of the full amount of the taxes paid.) The fact that Arkansas might, as a matter of federal law, limit petitioners' refunds to amounts in excess of the amounts paid by in-state truckers provides no reason, in equity or otherwise,

B. Failure To Return Discriminatory Taxes Fails to Eliminate The Unconstitutional Burden On Interstate Commerce.

A second reason why NPTC believes that application of the *Chevron* exception is inappropriate in cases involving discriminatory state taxes violative of the Commerce Clause is because the imposition and payment of such taxes *is* the unconstitutional burden, and the only way to eliminate the burden and to correct the unconstitutional violation is to return the payment. *See, e.g., Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), sustaining refund claims of sales taxes that discriminated against out-of-state products. Even if a decision finding the tax to be discriminatory establishes a new rule of law that was not foreseeable, that fact should not justify the refusal to eliminate the unconstitutional burden by returning the discriminatory exaction.

State taxes that discriminate against interstate commerce in violation of the Commerce Clause are analogous, for purposes of the retroactivity/prospectivity issue, to state or federal laws or actions that are held to amount to takings of property in violation of the Fourteenth or Fifth Amendment. If the Court finds that a person's property was taken without compensation, the fact that the decision may have established a new principle of law is not a reason to excuse the takers from paying appropriate compensation.[7] Otherwise the result would be to

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for refusing to refund at least the discriminatory portion of the taxes to petitioners.

Other courts have also denied retroactive refund relief for reasons which purport to reflect a balancing of equities but which in fact would merely justify the state in limiting the amount of refunds paid to various taxpayers. See, *e.g., National Can Corp. v. Department of Revenue*, 749 P.2d 1286 (Wash.), *appeal dism'd* and *cert. denied*, 108 S.Ct. 2030 (1988); *Salorio v. Glaser*, 461 A.2d 1100 (N.J.), *cert denied*, 464 U.S. 993 (1983).

[7] As noted at the outset, as in the case of tax refunds, there may be other legitimate grounds for limiting the retrospective liability

permit and sanction an unconstitutional taking of property. Similarly, to allow states to retain taxes that are found to discriminate against interstate commerce is to permit an unconstitutional burden on such commerce.

C. Application Of *Chevron's* Case-By-Case Analysis Will Lead To Greater Federal Court Intrusion Into State Tax Proceedings, Contrary to Congressional Policy, And To Greater Noncompliance With State Tax Laws and Procedures.

The *Chevron* exception should not be applied to this class of cases for the additional reasons that to do so is likely to increase the intrusions of federal courts into state tax proceedings, contrary to congressional policies, and also to increase noncompliance with state tax laws.

The Federal Tax Injunction Act, 28 U.S.C. § 1341, prohibits federal courts from enjoining the collection of state taxes so long as state law provides a "plain, speedy and efficient remedy" to taxpayers with respect to state taxes that violate federal constitutional or statutory restrictions. This Act reflects Congress' strong policy against federal court interference with state tax collections and state tax proceedings. If state law does not provide a reasonable prospect of refunds of unconstitutional taxes, the Act does not apply and federal courts may enjoin their collection, either permanently or preliminarily pending the adjudication of their validity. *See, e.g., American Trucking Associations, Inc. v. O'Neill*, 522 F. Supp. 49 (D. Conn. 1981) (preliminarily enjoining a state truck tax because of substantial doubts that state law provided a refund remedy.)

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of states for actions that appeared appropriate and noncompensable when they occurred, such as statutes of limitations. But the fact that the determination of liability occurred in the course of establishing a new principle of law is not a rational basis for refusing to require compensation.

To the extent that state courts appear disposed to invoke *Chevron* or other grounds to refuse refunds of taxes challenged on Commerce Clause grounds, taxpayers will be forced to seek preliminary injunctions from federal courts to protect themselves while the validity of the taxes are adjudicated. Indeed, in effect, that is precisely what petitioners were forced to do in this case. After the court below refused petitioners any interlocutory protection after this Court's decision in the *Scheiner* case, petitioners were required to seek and obtain such protection from Justice Blackmun. Certainly if the decision below is affirmed, NPTC would feel obliged in any future case it brought challenging state taxes or fees to seek a preliminary injunction or escrow order from a federal court if such relief were denied by state courts.[8]

Furthermore, as NPTC can attest from ample experience, the potential application of *Chevron* in cases like this one creates enormous uncertainty on the part of taxpayers during the period in which the validity of the tax is being litigated. One troublesome consequence of that uncertainty and of decisions like those of the court below is that they simply promote and encourage noncompliance with state tax laws. Many taxpayers confronted with taxes of questionable constitutionality and serious doubts as to whether their tax payments will be returned after the conclusion of litigation challenging the tax will have strong inducements simply not to pay the tax. Substantial noncompliance, in turn, creates great inequities among taxpayers. Where, as in this case, taxes are ultimately struck down but refunds are not paid, taxpayers who complied with the law and paid their taxes between 1983 and 1988 will be penalized and those who did not will be rewarded.

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[8] In most of the suits brought by NPTC's predecessor, PTCA was successful in persuading state trial courts to issue escrow orders.

D. Application of Chevron Analysis To This Category Of Cases Will Require This Court's Close Review Of The Facts And Alleged Equities Of Each Case To Ensure That National Interests Are Protected.

The final reason NPTC submits that application of the *Chevron* exception to this category of cases is that it will inevitably require this Court to review closely every case in which state courts apply *Chevron* to deny tax refunds in order to protect the national interest in the free flow of interstate commerce. That result will not only add substantially to the burden on this Court but also to the costs and burdens of the interstate enterprises that are subject to the taxes.

The reason that this Court's case-by-case review will be required is well ilustrated by this case. NPTC submits that the actions and rulings of the courts of Arkansas in this case plainly reflect that their primary concern is the revenue interests of the State of Arkansas and that they gave substantially greater weight to those interests than to the interests of out-of-state trucking companies in receiving tax refunds. To assert as much is not in any way to impugn the integrity and good faith of the courts of Arkansas. It is merely to recognize what the Framers of the Commerce Clause recognized: that the natural inclination of the states and their institutions—both legislative and judicial—is to be more responsive to and concerned with local needs and interests than with the interests of those outside the state. The Framers knew also that powerful political forces would drive these tendencies and that a strong national power over interstate commerce was needed to restrain them. This Court has recognized these realities on numerous occasions. See, *e.g.*, *Nippert v. Richmond*, 327 U.S. 416, 434-435 (1946); *McGoldrick v. Bermind-White Coal Mining Co.*, 309 U.S. 33, 45 n.2 (1940); *United States v. County of Fresno*, 429 U.S. 452, 458-59 (1977).

Many other state court decisions in this area reflect the same perspective and primary concern with state revenue needs as the Arkansas courts showed in this case. For example, in *Continental Trailways, Inc. v. Director, Division of Motor Vehicles*, 509 A.2d 769 (N.J. 1986), the Supreme Court of New Jersey denied refunds of taxes found to violate the Commerce Clause and candidly admitted that its decision was based on the court's policy to place the state's revenue interests over the federal constitutional rights of interstate carriers. The court stated (509 A.2d at 780); "Public policy discourages suits for refunds of taxes erroneously paid or illegally collected." *See also, Private Truck Council of America, Inc. v. State of New Hampshire, supra*, 517 A.2d at 1154, denying refunds on the basis of "policy considerations" relating to the state's revenue interests.

The kind of analysis required by *Chevron*, at least as applied to discriminatory state taxes, significantly enhances the likelihood that state courts will exercise their natural tendency to favor state interests over out-of-state interests; indeed, it almost encourages them to do so. *Chevron* calls upon courts to weigh considerations that are not easily quantifiable or determinable—the foreseeability of a particular decision, whether retroactive application will help or hinder Commerce Clause policies, and other unspecified equitable considerations—and, in the context of this class of cases, to apply those considerations to the particular facts in order to determine whether the state treasury will be required to pay what are often very substantial sums to out-of-state interests. Given the seemingly broad and flexible nature of the *Chevron* analysis, it is hardly surprising that many state courts have, like the Supreme Court of Arkansas, applied the *Chevron* factors to find in favor of the State Treasuries.[9]

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[9] In connection with the application of the *Chevron* analysis by state courts, issues related to discriminatory state taxes are very

State courts have ruled in favor of state revenue interests with increasing frequency despite the fact, discussed earlier, that consideration of *Chevron*'s third factor alone should rarely, if ever, justify denial of retroactive relief. Accordingly, unless this Court makes clear that the *Chevron* exception should not be applied to this class of cases, or should be applied only in very exceptional and specifically defined circumstances, the questions posed by this case will continue to come up in case after case; and the only way to ensure and to satisfy litigants that the interests of out-of-state taxpayers and the policies of the Commerce Clause have been properly weighed will be for this Court carefully to review, essentially on a *de novo* basis, each state court decision adverse to the taxpayers. That review imposes substntial burdens not only on the Court but also on the litigants and taxpayers.

Eliminating burdens on the Court and litigants is not in and of itself a reason to reject a doctrine of law in a particular class of cases. The fact that it will call for this Court's case-by-case review in this class of cases is, however, a further reason supporting NPTC's submission that the *Chevron* exception to the general rule of retroactive application is not appropriate in the case of decisions invalidating discriminatory state taxes under the Commerce Clause.

In summary, NPTC submits that the Court should hold that the *Chevron* exception to the general rule of retroactivity is not normally appropriate in cases involving discriminatory state taxes held to violate the Commerce

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different from most other legal and constitutional isseues that state courts may be called upon to apply *Chevron* to. The very constitutional infirmity that this class of cases deals with is favoritism shown by the state itself to state and local interests. These cases thus provide a built-in reason for doubting that, in making the kind of assessments called for by *Chevron*, state courts will properly balance the interests of the state and the interests of out-of-state inteersts.

Clause. If the Court believes that *Chevron* principles should be applied in these cases, however, the Court should at least indicate with some specificity what equitable consideration would justify denial of retroactive relief and should make clear that a state's revenue needs are not relevant considerations.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

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January 6, 1989

Supreme Court, U.S.
FILED
JAN 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-192 and No. 88-325

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MCKESSON CORPORATION,
Petitioner,
v.
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and the OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,
v.
MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents.

On Writs of Certiorari to the Supreme Court of Florida and the Supreme Court of Arkansas

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, Tax Executives Institute, Inc. respectfully moves the Court for leave to file the accompanying brief in support of Petitioners in this case as *amicus curiae*. Tax Executives Institute has requested the written consent of all parties to the filing of the accompanying brief. Petitioners and Respondents Division of Alcoholic Beverages, *et al.*, have consented to the filing of the brief, but the written consent of Respondents Maurice Smith, *et al.*, has not been received.*

1. Tax Executives Institute, Inc. is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4,300 members who represent more than 2,000 of the leading corporations in the United States and Canada. The members of the Institute represent a cross-section of the business community in North America, and the companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the nation and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers.

2. a. This case addresses the extent to which States may effectively attenuate decisions by this Court that state tax statutes unconstitutionally infringe upon interstate commerce by applying those decisions on a prospective-only basis. Nearly five years ago, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court invalidated a Hawaii statute under which local products were exempt from the alcoholic beverage tax as repugnant to the Constitution's Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. Earlier this year, the Supreme Court of Florida considered the constitutionality of a substantially similar Florida statute; although ruling on the basis of *Bacchus* that the Florida law violated the Commerce Clause, the Florida court concluded—without even citing the Court's seminal decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)—that its finding of unconstitutionality should apply on a prospective-only basis. *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988), *reprinted in* Appendix B to McKesson Corporation's Petition for a Writ of Certiorari (McKesson App. B).

b. Similarly, two terms ago, the Court in *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987), ruled that the Commerce Clause was violated by two Pennsylvania statutes that imposed lump-sum annual taxes on the operation of trucks on Pennsylvania highways. Three days later, a pending case involving a similar Arkansas statute was remanded to the Supreme Court of Arkansas for further consideration in light of that case. *American Trucking Associations, Inc. v. Gray*, 107 S. Ct. 3252 (1987). On March 22, 1988, the Arkansas court held that the Arkansas statute offended the Commerce Clause. The court, however, construed *Chevron* not to mandate the retroactive application of its decision. *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), *reprinted in* Appendix A to the American Trucking Associations' Petition for a Writ of Certiorari (ATA App. A). The court not only concluded that no refund need be made of taxes collected

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* The consents of Petitioners and of Respondents Division of Alcoholic Beverages, *et al.*, have been filed with the Clerk of the Court. Respondents Maurice Smith, *et al.*, have neither denied nor granted Tax Executives Institute's request for written consent. If such consent is subsequently received, it shall promptly be filed with the Clerk of the Court.

under the unconstitutional statute before this Court's decision in *Scheiner* but further held that taxes collected *after* the decision—up until the time an escrow was imposed on the State by Justice Blackmun, 108 S. Ct. 2 (1987)—could be retained by the State. ATA App. A at 5a.

3. a. Tax Executives Institute's members have a vital interest in the resolution of the prospective-only issue raised by the *McKesson* and *American Trucking Associations (ATA)* cases. This Court's resolution of these cases will affect far more than the State of Florida's and the State of Arkansas's ability to retain the unconstitutional taxes they have collected from particular taxpayers. The Institute is concerned that the decisions of the Florida and Arkansas courts, if not reversed, could substantially dilute the protection intended by the Commerce Clause. Should the Court affirm either decision, courts and legislatures in other States may well conclude that the Constitution does not bar either the *enactment* of tax statutes that discriminate against interstate commerce or even the *collection* of discriminatory taxes *pendente lite*, but rather only the continued collection of discriminatory taxes after the unconstitutionality of the particular statutes is explicitly confirmed by the Court. Indeed, a disturbing trend in that direction can already be discerned —*see, e.g., Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed for want of final judgment*, 107 S. Ct. 1949 (1987) (remand pending) (the Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), should be applied only to Armco); *National Can Corp. v. Department of Revenue*, 109 Wash.2d 878, 749 P.2d 1286 (1988), *appeal dismissed and cert. denied*, 108 S. Ct. 2030 (1988) (the Court's finding of unconstitutionality in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S. Ct. 2810 (1987), will be applied on a prospective-only basis). Obversely, if the Court reverses the Florida and Arkansas decisions, the right of all taxpayers to be free from taxes that impose undue burdens on interstate commerce will be vindicated and the Commerce Clause itself will be vivified.

b. The members of the Institute and their employers would bear the additional and discriminatory costs that could result from the States' continued misapplication (or nonapplication) of the *Chevron* standard. Because they would consequently suffer the "unreasonable clog upon the mobility of commerce," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), that could result from the Florida and Arkansas decisions, the Institute has a special and direct interest in the outcome of this case.

WHEREFORE, it is respectfully requested that Tax Executives Institute's motion for leave to file the accompanying brief *amicus curiae* in support of the Petitioners in the case be granted.

Respectfully submitted,

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Date: January 6, 1989

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-192 and No. 88-325

MCKESSON CORPORATION,
Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and the OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents.

On Writs of Certiorari to the Supreme Court of Florida and the Supreme Court of Arkansas

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioners. Tax Executives Institute, Inc. is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4,300 members who represent more than 2,000 of the leading corporations in the United States and Canada. The members of the Institute represent a cross-section of the business community in North America, and the companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the nation and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers.

SUMMARY OF ARGUMENT

This case addresses the extent to which States may effectively attenuate decisions by this Court that state tax statutes unconstitutionally infringe upon interstate commerce by applying those decisions on a prospective-only basis. Nearly five years ago, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court invalidated a Hawaii statute under which local products were exempt from the alcoholic beverage tax as repugnant to the Constitution's Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. Earlier this year, the Supreme Court of Florida considered the constitutionality of a substantially similar Florida statute; although ruling on the basis of *Bacchus* that the Florida law violated the Commerce Clause, the Florida court concluded—without even citing the Court's seminal decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)—that its finding of unconstitutionality should apply on a prospective-only basis. *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988), *reprinted in* Appendix B to McKesson Corporation's Petition for a Writ of Certiorari (McKesson App. B).

Similarly, two terms ago, the Court in *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987), ruled that the Commerce Clause was violated by two Pennsylvania statutes that imposed lump-sum annual taxes on the operation of trucks on Pennsylvania highways. Three days later, a pending case involving a similar Arkansas statute was remanded to the Supreme Court of Arkansas for further consideration in light of that case. *American Trucking Associations, Inc. v. Gray*, 107 S. Ct. 3252 (1987). On March 22, 1988, the Arkansas court held that the Arkansas statute offended the Commerce Clause. The court, however, construed *Chevron* not to mandate the retroactive application of its decision. *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), *reprinted in* Appendix A to the American Trucking Associations' Petition for a Writ of Certiorari (ATA App. A). The court not only concluded that no refund need be made of taxes collected under the unconstitutional statute before this Court's decision in *Scheiner* but further held that taxes collected *after* the decision—up until the time an escrow was imposed on the State by Justice Blackmun, 108 S. Ct. 2 (1987)—could be retained by the State. ATA App. A at 5a.

Tax Executives Institute's members have a vital interest in the resolution of the prospective-only issue raised by the *McKesson* and *American Trucking Associations (ATA)* cases. The Court's resolution of these cases will affect far more than the State of Florida's and the State of Arkansas's ability to retain the unconstitutional taxes they have collected from particular taxpayers. The Institute is concerned that the decisions of the Florida and

Arkansas courts, if not reversed, could substantially dilute the protection intended by the Commerce Clause. Should the Court affirm either decision, courts and legislatures in other States might well conclude that the Constitution does not bar either the *enactment* of tax statutes that discriminate against interstate commerce or even the *collection* of discriminatory taxes *pendente lite*, but rather only the continued collection of discriminatory taxes after the unconstitutionality of the particular statutes is explicitly confirmed by the Court. Indeed, a disturbing trend in that direction can already be discerned —*see, e.g., Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed for want of final judgment*, 107 S. Ct. 1949 (1987) (remand pending) (the Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), should be applied only to Armco); *National Can Corp. v. Department of Revenue*, 109 Wash.2d 878, 749 P.2d 1286 (1988), *appeal dismissed and cert. denied*, 108 S. Ct. 2030 (1988) (the Court's finding of unconstitutionality in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S. Ct. 2810 (1987), will be applied on a prospective-only basis). Obversely, if the Court reverses the Florida and Arkansas decisions, the right of all taxpayers to be free from taxes that impose undue burdens on interstate commerce will be vindicated and the Commerce Clause itself will be vivified.

The members of the Institute and their employers would bear the additional and discriminatory costs that could result from the States' continued misapplication (or nonapplication) of the *Chevron* standard. Because they would consequently suffer the "unreasonable clog upon the mobility of commerce," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), that could result from the Florida and Arkansas decisions, *Amicus* Tax Executives Institute has a special and direct interest in the outcome of this case. The Institute respectfully submits that, in light of the States' repeated misapplication of the *Chevron* standard, it may be appropriate for

the Court not only to clarify and thereby vivify that standard, but to give consideration to the adoption of a new standard in respect of state tax statutes found to violate the Commerce Clause. *See Griffith v. Kentucky*, 479 U.S. 314 (1987).

ARGUMENT

I.

A. McKesson: The Florida Statute

The constitutional fate of the State of Florida's alcohol beverage law was effectively sealed by the Court's 1984 decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). In that case, the Court addressed whether the State of Hawaii's exemption from the liquor excise tax for local products contravened the Constitution's Commerce Clause. Observing that the presence of either a discriminatory purpose, *citing Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-53 (1977), or a discriminatory effect, *citing Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), justified a finding of proscribed "economic protectionism," 468 U.S. at 270, the Court concluded that the Hawaii statute violated the Commerce Clause "because it had both the purpose and effect of discriminating in favor of local products." 468 U.S. at 273 (footnote omitted).

In response to the Court's decision in *Bacchus*, the Florida legislature held hearings to consider possible amendments to a Florida statute that was substantially similar to that struck down in *Bacchus*. The legislature removed the word "Florida" from the statute and, in its place, enacted language that, among other things, granted exemptions or tax preferences to wines and distilled spirits manufactured from citrus, sugar cane, and certain grape species, all of which were grown in Florida. The petitioner in No. 88-192, McKesson Corporation, challenged the validity of the revised statute, arguing that it effected the same proscribed, discriminatory re-

sult as its predecessor.[1] The Supreme Court of Florida agreed that the tax scheme placed "a clear discriminatory burden on interstate commerce." McKesson App. B at 11a. The Florida court reasoned that the State's interest in promoting alcoholic beverages made with Florida products was fundamentally at odds with the "general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." McKesson App. B at 18a, *citing Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980).[2]

Notwithstanding its conclusion that the Florida statute was unconstitutional (citing both *Bacchus* and *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977)), the Florida court held that its ruling should not be given retroactive effect. In reaching this result, the court made no reference to this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), in which the governing standards for gauging the retroactivity of judicial decisions in civil cases were articulated. Rather, the court simply stated:

> We agree with the DABT [Department of Alcoholic Beverages and Tobacco] that the prospective nature of the rulings below was proper in light of the equitable considerations present in this case. *See Gulesian v. Dade County School Board* 281 So.2d 325 (Fla. 1973); *Lemon v. Kurtzman*, 411 U.S. 192 (1973). Not only was the tax preference scheme implemented by the DABT in good faith reliance on a presumptively valid statute, . . . [but] if given a refund, cross-appellants would in all probability receive a windfall, since the cost of the tax has been passed on to their customers.

McKesson App. B at 21a.

[1] One sponsor of the revised Florida statute explained to the legislative committee that the changes were designed "simply to retain what we have done for the last twenty years." McKesson Corporation's Petition for a Writ of Certiorari at 2.

[2] The court quoted the following from *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985): "[I]n Bacchus, although we observed as a general matter that 'a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry,' we held that in doing so, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business." 470 U.S. at 877 n.6 (citations omitted), *quoted at* McKesson App. B at 18a-19a.

B. ATA: The Arkansas Statute

From the time of its enactment in 1983, the State of Arkansas' Highway Use Equalization (HUE) Tax was the subject of constitutional attack.[3] Even before the tax went into effect, the petitioners in No. 88-325 brought suit challenging its constitutionality under the Commerce Clause. During the pendency of that litigation, this Court ruled that a substantially similar Pennsylvania tax discriminated unreasonably against interstate commerce and was therefore unconstitutional. *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987).[4] In the Pennsylvania case, the Court reviewed its prior decisions, and concluded:

> We find dispositive those of our precedents which make it clear that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States.

[3] Under the Arkansas legislation, heavy trucks operating on the State's highways were required to pay either an annual flat tax of $175 or a tax of five cents for each mile traveled in Arkansas; if a vehicle traveled more than 3,500 miles in a year, it was to the carrier's advantage to elect to pay the flat $175 rate.

[4] ATA's challenge to the Arkansas HUE tax was pending in the Court at the time a decision was rendered in the Pennsylvania case (*Scheiner*). Following the Court's decision, the decision of the Supreme Court of Arkansas was vacated and remanded for reconsideration in light of *Scheiner*. *See American Trucking Associations, Inc. v. Gray*, 288 Ark. 488, 707 S.W.2d 759 (1986), *vacated and remanded*, 107 S. Ct. 3252 (1987).

107 S. Ct. at 2839 (footnote omitted). Among the cases the Court relied on in evaluating the Pennsylvania flat tax was *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which the Court said had "necessarily called into question the future vitality of earlier cases that had upheld facially neutral flat taxes against challenges premised on the rule of immunity for interstate commerce." 107 S. Ct. at 2846.

Notwithstanding the *Scheiner* decision, the State of Arkansas continued to collect the Arkansas HUE tax.[5] Indeed, the taxes were not even escrowed until August 14, 1987, when the State was ordered to establish an escrow fund by Justice Blackmun (acting in his capacity as Circuit Justice). 108 S. Ct. 2 (1987). On March 14, 1988, the Supreme Court of Arkansas held that there was "little doubt" that this Court would—under *Scheiner*—strike down the Arkansas HUE tax, and accordingly, the Arkansas court held the tax to be unconstitutional. ATA App. A at 2a-3a.

Utilizing *Chevron*'s governing test, the court concluded that its decision should be applied on a prospective-only basis. Indeed, the court extended the period of non-application of the *Scheiner* decision forward to August 14, 1987—the date Justice Blackmun ordered that the HUE taxes be placed in escrow.[6]

C. The Importance of These Cases

Amicus Tax Executives Institute submits that the proper resolution of the retroactivity issue—and the clarification of the standard to be used in resolving particular

[5] The HUE tax was repealed during an October 1987 special session of the Arkansas legislature; in its place, the legislature imposed a replacement tax of 2½ cents per mile, with no ceiling for extensive highway use.

[6] From the time the HUE tax was enacted in 1983 until Justice Blackmun's order of August 14, 1987, approximately $159 million was collected under the discriminatory taxing scheme. ATA App. A at 3a.

cases—is of paramount importance. If the standard is not clarified, other States may conclude that they are free to apply this Court's decisions on a prospective-only basis. Such a result could frustrate the policy underlying the Commerce Clause by allowing the States to enjoy the financial benefits of their discriminatory taxation—the fruits of their own unconstitutional acts. Perhaps more fundamentally, failure to clarify the weight and effect to be given to decisions of the Court could undermine its overall authority as the arbiter of constitutional issues.

II.

Although the Constitution neither prohibits nor requires retrospective effect, *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), the rule remains that "a legal system based on precedent has a built-in presumption of retroactivity." *Solem v. Stumes*, 465 U.S. 638, 642 (1984). *Accord Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2025 (1987). *See generally* L. Tribe, *American Constitutional Law* 29-30 & n.20 (2d ed. 1988).[7] Thus, although exceptions to the rule of retroactivity should be recognized as a matter of policy, the exceptions should not swallow the rule.[8]

In respect of civil cases, the factors to be analyzed in resolving the retroactivity issue were set forth by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).[9]

[7] The general rule can be traced to Blackstone. 1 W. Blackstone, *Commentaries* *70-71; *see Norton v. Shelby County*, 118 U.S. 425, 442 (1886); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

[8] *See EEOC v. Vucitech*, 842 F.2d 936, 941-42 (7th Cir. 1988) ("[t]he presumption [is] strongly in favor of retroactive application").

[9] The *Chevron* case did not involve the retroactive effect to be given to a ruling of *unconstitutionality*. Rather, the case addressed the reach of a decision that Louisiana's statute of limitations governed claims for personal injuries sustained on the Outer Continental Shelf off the coast of Louisiana. In *Chevron*, the Court

In that case, the Court confirmed the general rule of retroactivity and held that, in determining whether there should be an exception to that rule, the following three factors should be considered:

- *Reliance*: Whether the decision establishes a new principle of law or involves an issue of first impression whose resolution was not clearly foreseen.
- *Purpose*: Whether, based on the history of the rule in question, its purpose and effect, non-retroactive application will advance or retard the operation of the new rule.
- *Inequity*: Whether non-retroactive application is necessary to avoid injustice or hardship.

404 U.S. at 106-07. *See* Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues under the Commerce Clause*, 41 Tax Lawyer 103, 138-39 (1987).

The Supreme Court of Florida in *McKesson* made no reference to *Chevron* in ruling that it need not apply its decision of unconstitutionality retroactively. The State of Arkansas in *ATA* acknowledged the relevance of the Court's decision, but construed it to permit the application of the *Scheiner* case on a prospective-only basis. In doing so, the Arkansas court transmogrified the three-part test of *Chevron* into a standard so pliable that virtually all rulings of unconstitutionality could be applied, at a State's choosing, on a prospective-only basis.

That neither the Florida nor the Arkansas decision can withstand scrutiny under a proper reading of *Chevron* is

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held that its decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), should not apply retroactively to litigants who had relied on several federal cases holding that admiralty law (specifically, the doctrine of laches) controlled the issue. 404 U.S. at 108-09. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), which changed the analysis to be used in criminal procedure cases, the Court confirmed that *Chevron* continues to govern civil cases. 479 U.S. at 322 n.8.

confirmed by analyzing the three factors seriatim. The first factor—whether the decision at issue established a new principle of law—is, of course, the threshold requirement for prospective-only treatment: *if the governing principle was extant at the time of the decision, then the decision must be applied retroactively.*[10]

The principle underlying the instant cases—that discrimination against interstate commerce in the exercise of local taxing authority is unconstitutional—is far from new. Even before *Bacchus* and *Scheiner*, this Court had clearly ruled that the Commerce Clause proscribed tax statutes treating interstate businesses less favorably than local businesses. As the Court observed in *Scheiner*:

> Under our consistent course of decisions in recent years a state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause.

107 S. Ct. at 2841-42, *citing Tyler Pipe Industries*; *Bacchus*; *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977).

Had the Supreme Court of Florida properly applied the *Chevron* standard, it surely would have concluded that its decision had to be given retroactive effect. The Florida court did not break new ground in striking down the Florida alcohol beverage law; it expressly relied on this Court's decisions in *Bacchus* and *Hunt v. Washington State Apple Advertising Commission*—decisions rendered four and eleven years before the Florida court's decision.

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[10] *See United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982) (if the "new principle" standard is not met, *Chevron*'s other two factors need not be considered—the decision will be applied retroactively).

The Florida court did aver that the State had implemented the taxing scheme "in good faith reliance on a presumptively valid statute." McKesson App. B at 21a. All statutes are presumed to be valid, however, until a court otherwise holds. To conclude that a State's spurious "presumption of validity" satisfies the reliance prong of the *Chevron* standard would be to rob the test of all worth: States could act with virtual impunity, knowing that their "reliance" on "presumptively valid statutes" immunized them from constitutional attack. Indeed, States might infer a subtler, more disturbing message from such an approach: perhaps ignorance of the law *is* an excuse.[11]

As to the Arkansas HUE tax, the question whether *Scheiner* represented a "clear break" with prior precedent —thereby leaving open the issue of its retroactive appli-tion—is concededly problematic. From the date of the Court's decision in *Scheiner*, however, the result is clear beyond peradventure: the HUE tax was unconstitutionally discriminatory and any taxes collected under such a tax should be refunded.

Even with respect to pre-*Scheiner* periods, it is not clear that the Arkansas decision survives *Chevron*'s threshold test. The question is not, as the Arkansas court assumed, "whether it was reasonable for the state to have conducted itself as it did" or whether "a reasonable person could easily have found [the tax] to pass Commerce Clause muster." ATA App. A at 3a-4a. Rather, the first *Chevron* factor focuses on whether the decision "overruled clear past precedent" or involved "an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106. In light of the Court's

[11] *See Chapman v. California*, 386 U.S. 18, 21 (1967) (criminal procedure case) ("we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights").

earlier decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the result in *Scheiner* can be said to have been clearly foreshadowed. *American Trucking Association v. Kline*, No. 07-17-1667-85MVT (N.J. Tax Ct. Sept. 8, 1988).[12]

Chevron's second test addresses whether non-retroactive application of the new rule will advance or retard the operation of the new rule. Again, the Florida court was silent on this issue. The Arkansas court, however, proffered a beguiling argument. Specifically, the court quoted from a decision of the Washington Supreme Court in which non-retroactive application of this Court's decision in *Tyler Pipe Industries* was sustained. In that Washington case, the court blithely stated:

> It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate commerce is in the past . . . .

National Can Corp. v. Department of Revenue, 109 Wash. 2d 878, 888, 749 P.2d 1286, 1291 (1988), *appeal dismissed and cert. denied*, 108 S. Ct. 2030 (1988), *cited at* ATA App. A at 4a.

Under the Arkansas court's reading of *Chevron*'s purpose test, a ruling of unconstitutionality would never be applied retroactively and the States would have an incentive to enact unconstitutional statutes.[13] The overall

[12] In *Kline*, the New Jersey Tax Court held that *Scheiner* should be applied retroactively. The court stated that "[e]ven if *Complete Auto Transit* did not specifically overrule the *Greyhound* and *Aero Mayflower* cases of 1935, 1947 and 1950, . . . the invalidity of flat taxes which discriminate as a matter of practical effect was clearly foreshadowed by *Complete Auto Transit*." Slip Op. at 9. The *Aero Mayflower* cases—*Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285 (1935)—were cited by the Arkansas court as cases on which it relied in initially sustaining the HUE tax. ATA App. A at 4a.

[13] *See* Tatarowicz, *supra*, 41 Tax Lawyer at 141-42 ("the practical effect [of prospective-only application] would be to permit

result, therefore, would be to retard the purpose of the Commerce Clause.

The courts' treatment of the inequity test in *Chevron* is particularly troubling. Under *Chevron*, the issue is whether prospective application is necessary to avoid injustice or undue hardship. Both the Florida and Arkansas courts devoted precious little time to analyzing any hardship the retroactive application of the decisions might bring. In *McKesson*, the Florida court referred to "equitable considerations," but focused not on any hardship to the State but rather on the "windfall" the petitioners would "in all probability" receive (on the assumption that the unconstitutional taxes could be passed on to customers). McKesson App. B at 21a. The Arkansas court, too, made reference to the "unconscionable windfall" the petitioners would receive if refunds were ordered; it also raised the specter of hardship in its references to the State's having spent or "counted on" the collected unconstitutional taxes. ATA App. A at 4a-5a.[14]

The courts' "windfall" analysis not only lacks factual support [15] but, more fundamentally, focuses on the wrong

states the financial benefits of discriminatory taxation. A state could enact tax laws without concern for constitutional limitation, knowing that, if such laws were ultimately found to discriminate against interstate commerce, they could be repealed with impunity. . . . [T]he prospective application of a finding of unconstitutionality retards the purpose of the commerce clause by offering the inducement of clear financial advantage to those states that violate it.").

[14] That the State had already expended the unconstitutional HUE taxes, or at least taken them into account for budgeting purposes, was the court's justification for refusing to order refunds of the taxes collected during the post-*Scheiner*, pre-escrow period. ATA App. A at 5a.

[15] *See Bacchus*, 468 U.S. at 267 (even if the tax is completely and successfully passed on, taxpayers are entitled to litigate the extent to which the discriminatory tax adversely affected their ability to compete against local producers).

party. The issue is not whether a litigant might enjoy a benefit from lodging a successful challenge to an unconstitutional statute; that is often the case. Instead, it is whether there are factors present that, despite the losing litigant's culpability, militate against the general rule of retroactivity. Thus, the inequity test measures the hardship or injustice that might befall the State (or third parties) and balances that hardship against the right (constitutional or economic) that would be more fully vindicated by the retroactive application of the decision.

Under a properly framed inequity test, there should be no doubt that the "hardship" endured by the States—the required refund of unconstitutional taxes that had been "counted on"—does not pass muster. Indeed, if such a "hardship" were deemed sufficient to justify prospective treatment, unconstitutional tax statutes would rarely, if ever, be overturned retroactively. States invariably spend the revenues they collect. The sounder approach is to examine whether *undue* hardship would result from retroactive application of a decision. Under such an analysis, a different result obtains, for the "hardship" of which the States might complain is one of their own making—the result of their own unconstitutional acts.[16]

In this regard, it is instructive to consider those cases in which the Court has provided relief under the inequity prong of the *Chevron* test (or comparable standards). For example, in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*)—which was the only decision of this Court that the Florida court in *McKesson* cited on the retroactiv-

[16] Thus, the courts' suggestion that retroactive application is inappropriate because the petitioners in *McKesson* "in all probability" passed the economic burden of the tax on to customers or because in-state drivers in *ATA* had not sought a refund of the taxes they paid (under a taxing scheme designed to accord them beneficial treatment) has absolutely no bearing on whether the refund of the unconstitutional taxes would impose an undue hardship on the States.

ity issue—the Court limited the effect of its decision two years earlier in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*), which invalidated, on First Amendment grounds, a Pennsylvania statute authorizing State reimbursement to private sectarian schools for certain educational services provided by the schools. The hardships of which the Court was concerned in that case were not the State's, but rather those of the private schools that had provided services and incurred expenses in reliance on the constitutionally defective statute. 411 U.S. at 203-04. (Indeed, the State would have been relieved of a financial burden had the Court applied its decision on a retroactive basis.) Similarly, in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court limited the retroactive effect of a decision holding unconstitutional a Louisiana statute permitting only property taxpayers to vote in elections called to approve the issuance of public utility revenue bonds. The hardship addressed by the Court was again not the State's but rather that which would have been suffered by cities and bondholders (who had relied on the state law) had the decision been applied retroactively. 395 U.S. at 706.[17]

Thus, in applying the inequity test, the Court has focused on whether hardship would befall parties or other individuals who did not have it within their power to rectify the situation by adopting the rule in question. The States of Florida and Arkansas clearly did have the

[17] *See also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982) (decision holding the Bankruptcy Act of 1980 unconstitutional applied prospectively because of the substantial injustice and hardship that would otherwise be visited upon litigants who had relied on the statute); *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 722-23 (1978) (decision that city department's employee benefit plan violated Title VII of the Civil Rights Act of 1964, as amended, applied prospectively because of the "devastating" effect retroactivity could have "in large part on innocent third parties"—covered employees).

power to enact constitutional, nondiscriminatory tax statutes.

Moreover, even assuming the States could demonstrate that they would suffer an undue hardship if compelled to refund immediately all unconstitutionally collected taxes, it does not follow—as the Florida and Arkansas courts effectively concluded—that the wronged taxpayers should receive nothing.[18] In appropriate cases, a State might—perhaps under guidelines prescribed by the legislature—craft a refund policy that minimizes the "inequity" the State might otherwise suffer. For example, a State might provide that the taxes unconstitutionally collected (plus an interest factor) could be claimed as a credit on the affected taxpayers' future years' tax returns.[19]

In summary, the Florida court ignored, and the Arkansas court misapprehended, all three of *Chevron*'s tests. Their failure to analyze *Chevron* properly, if not rectified, could be used to sanction prospective-only application in respect of virtually all decisions declaring state tax statutes unconstitutional. Such a result would be pernicious—nullifying the Court's decisions in *Bacchus* and *Scheiner* and frustrating the policy underlying the Commerce Clause.

III.

The questions presented by this case are substantial and important not only because the Florida and Arkansas decisions threaten to eviscerate this Court's holdings in *Bacchus* and *Scheiner*, but also because the Florida and Arkansas cases are but recent examples of the States'

[18] Obviously, the hardship suffered by the States in such an instance would be no greater than the hardship collectively suffered by the taxpayers from whom the taxes were unconstitutionally exacted.

[19] Tatarowicz, *supra*, 41 Tax Lawyer at 143 & n.248. Alternatively, the taxes at issue could be refunded in installments. 41 Tax Lawyer at 143.

misconstruing both the requirements of the Commerce Clause and the standard set forth in *Chevron*. Indeed, during the past five years, there has been a vertiable wave of state court decisions in which discriminatory statutes have been found, in essence, to be unconstitutional on a prospective-only basis.

For example, the State of West Virginia is now contending on the remand of *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed for want of final judgment*, 107 S. Ct. 1949 (1987) (remand pending), that this Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), should be applied only to Armco. Similarly, in *National Can Corp.*, the Supreme Court of Washington refused to give effect to, and refused to pay refunds under, this Court's decision in *Tyler Pipe Industries.*[20] *See also Penn Mutual Life Insurance Co. v. Department of Licensing and Regulation*, 162 Mich. App. 123, 412 N.W.2d 668 (1987), and *Metropolitan Life Insurance Co. v. Commissioner of Insurance*, 373 N.W.2d 399 (N.D. 1985), which both held that the Court's decision in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), invalidating a provision taxing foreign insurers, should apply on a prospective-only basis.[21]

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[20] The Court's disposition of the *National Can* case last term notwithstanding, the Washington court's decision—and its analysis of *Chevron* (which the Arkansas court cited with approval in *ATA*)—underscores the need for the Court to articulate clear standards concerning the prospective-only issue.

[21] For a list of other cases in which state courts have applied decisions that a tax is unconstitutional on a prospective-only basis, see Tatarowicz, *supra*, 41 Tax Lawyer at 117-18 n.89. *Compare American Trucking Associations, Inc. v. Goldstein*, 312 Md. 583, 541 A.2d 955 (1988) (overturning, based on *Chevron*, the State of Maryland's effort to postpone the effective date of the *Scheiner* decision for nearly a year); *American Trucking Association v. Kline*, No. 07-17-1667-85MVT (N.J. Tax Ct. Sept. 8, 1988) (*Scheiner* applied retroactively); *American Trucking Associations, Inc. v. Conway*, [Vt.] State Tax Rep. (CCH) ¶ 200-306 (No. S-147-86WnC) (Vt. Super. Ct., Washington Co., Feb. 11, 1988), *appeal docketed*, No. 88-156 (Vt. Mar. 11, 1988) (*Scheiner* applied retroactively).

These other cases—when viewed in conjunction with the cases at hand—vividly illustrate that the States, at best, misunderstand the balance that is to be struck in considering the retroactivity question and, at worst, have virtually no regard for the policy underlying the Commerce Clause or for the precedents of this Court. State after state has adopted what can be described as a "heads I win, tails you lose" approach to cases implicating the Commerce Clause's proscription on discriminatory tax statutes. If a State prevails in litigation and the challenged statute is sustained, all taxpayers (rightfully) lose. But if a State loses and the statute is found to be constitutionally deficient, the State then declares that the decision established a "new principle" and nimbly concludes that it should receive prospective-only application. As a result, all taxpayers (with the possible exception of the victorious litigant who in any event may have incurred substantial costs) lose.

Such adroit reading of precedent and deft, self-serving application of *Chevron* may enrich the particular State's fisc, but the results can hardly be said to foster the policy underlying the Commerce Clause. If not clarified, the decisions below might not only lead States to ignore Commerce Clause concerns but also discourage taxpayers from challenging clearly discriminatory tax statutes. These facts remain:

- The enactment of discriminatory taxes violates the Constitution.
- The collection of discriminatory taxes violates the Constitution.
- The retention of discriminatory taxes violates the Constitution.

Because the question of the refund of unconstitutionally imposed and collected taxes is one of remedy, it

is properly addresed in the first instance by state courts. *Bacchus*, 468 U.S. at 277; *Scheiner*, 107 S. Ct. at 2847. The remand from this Court in such cases, however, invariably requires that the lower court's disposition of the remedy question be "not inconsistent with this opinion." 468 U.S. at 277; 107 S. Ct. at 2848. The wave of prospective-only holdings that have ensued fail the test of consistency—with respect both to the Commerce Clause and the Court's teaching in *Chevron*. It should be stopped.

IV.

Amicus Tax Executives Institute respectfully submits that, in light of the States' repeated misapplication of the *Chevron* standard, it may be appropriate for the Court not only to clarify and thereby vivify that standard, but to give consideration to the adoption of a new standard in respect of state tax statutes found to violate the Commerce Clause.

Two terms ago, in *Griffith v. Kentucky*, 479 U.S. 314 (1987), this Court considered—and found constitutionally repugnant—the racially discriminatory use by prosecutors of peremptory challenges. Declaring that "[t]he time for toleration has come to an end," 479 U.S. at 323, *quoting United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982), the Court concluded that generally new rules for the conduct of criminal prosecutions will be applied retroactively to all pending or non-final cases even if they constitute a "clear break" with the past. 479 U.S. at 328. *See* L. Tribe, *American Constitutional Law* 31 n.26 (2d ed. 1988).

Although cases addressing the validity of discriminatory state tax statutes do not involve considerations of the same magnitude as those presented in criminal procedure cases, such cases do implicate a constitutional right—an interstate business's right under the Commerce Clause to be free from undue state-imposed burdens.

Thus, they involve rights different from, and indeed more significant than, the statute of limitations issue presented in *Chevron*.[22]

In addition, unlike the other civil cases in which the retroactivity issue has been considered, the unsuccessful litigant in a discriminatory state tax case—the party who seeks to have the finding of unconstitutionality applied on a prospective-only basis (the State)—is the progenitor of the proscribed (unconstitutional) action. The States do have it within their power to enact constitutional tax statutes. This fact alone suggests that the States should be held to a higher standard in obtaining exceptions to the general rule of retroactivity. States should not be permitted to reap the benefits of discriminatory taxation while impeding interstate commerce. The States' checkered history in enacting, collecting, and refusing to refund unconstitutional taxes only underscores this conclusion. As this Court stated in *Griffith*, "[t]he time for toleration has come to an end." 479 U.S. at 323.

CONCLUSION

For the foregoing reasons, the Court should reverse the decisions of the courts below.

Respectfully submitted,

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[22] *See* note 9, *supra*.

(9) (6)

No. 88-192 and No. 88-325

Supreme Court, U.S.
FILED
JAN 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MCKESSON CORPORATION,
Petitioner,
v.
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLER, STATE OF FLORIDA,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Florida

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AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioner,
v.
MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Supreme Court of the United States

OCTOBER TERM, 1988

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Committee on State Taxation of the Council of State Chambers of Commerce hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of the petitioners in the above-captioned cases. Written consents of the petitioners and of the respond-

ent in Case No. 88-192 have been obtained. The consent of the respondents in Case No. 88-325 was requested but refused.

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 40 Chambers of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the COUNCIL, consists of 291 corporate members which conduct a substantial portion of the interstate commerce of United States taxpayers. One of COST's principal activities has been to work with the States and others toward developing fair and equitable standards of state taxation. Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST is, therefore, vitally interested in cases such as the instant cases in which the States of Arkansas and Florida have given "prospective only" effect to judicial decisions holding discriminatory state taxation schemes unconstitutional, thereby denying taxpayers relief from the states' levy of unconstitutional taxes.

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, No. 88-192, the Florida Supreme Court held that although Florida's tax preferred treatment for alcoholic beverages made from Florida's crops was invalid under *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), the holding is "prospective" because of Florida's alleged "good faith reliance on a presumptively valid statute". The challenged alcoholic beverage excise tax scheme providing tax preferences for alcoholic beverages manufactured from certain crops, *all of which grow in Florida*, was adopted as an attempt to circumvent this Court's decision in *Bacchus*. Before this statutory amendment, tax preferred treatment was granted explicitly to alcoholic beverages manufactured and bottled in Florida from Florida products.

In *American Trucking Ass'ns, Inc. v. Smith*, No. 88-325, the Arkansas Supreme Court not only denied application to open years of this Court's decision on June 23, 1987 in *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987), invalidating Pennsylvania's highway flat taxes as unconstitutionally discriminatory under the Commerce Clause, but applied *Scheiner* prospectively from August 14, 1987, the date Justice Blackmun ordered the contested taxes be placed in escrow. 108 S. Ct. 2 (1987). Other States have sought to apply the prospectivity doctrine to avoid refunds of similar flat taxes found unconstitutional under this Court's *Scheiner* decision, including Maryland, Pennsylvania, New Jersey and Vermont. In a particularly disturbing action, the Maryland Circuit Court attempted to delay implementation of *Scheiner* until July 1, *1988*. *American Trucking Ass'ns, Inc. v. Goldstein*, No. 87182090/CE67934 (Md. Cir. Ct. Oct. 23, 1987), *rev'd*, 541 A.2d 955 (Md. 1988). The split of authority and the importance of this "prospective only" problem was highlighted by the New Jersey Tax Court in its opinion issued on September 8, 1988 in *American Trucking Ass'ns, Inc. v. Kline*, No. 07-14-1667-85MVT, ordering refunds of unconstitutional truck decal taxes so that "legislators will be dissuaded from enacting legislation which discriminates against interstate commerce."

A similar "prospective only" issue is presented by the appellant before this Court in *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W. Va.), *appeal docketed*, No. 88-421, in which West Virginia is attempting to give prospective effect only, except as to Armco, to this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), invalidating the state's wholesale gross receipts tax as unconstitutionally discriminatory under the Commerce Clause. The West Virginia Supreme Court held that the State can retain all unconstitutional taxes assessed and collected prior to June 12, 1984 and continue to assess and collect unconstitutional taxes for tax periods prior to June 12, 1984.

Until recently, States and taxpayers recognized a taxpayer's right to a refund or abatement of unconstitutionally-exacted taxes. There is a disturbing, emerging trend by some States to apply a judicial decision of unconstitutional or illegal state taxation on a "prospective only" basis, thereby allowing them to retain the financial benefit of the revenues collected under the unconstitutional law. *See also National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d 1286 (Wash.), *appeal dismissed, cert. denied*, 108 S. Ct. 2030 (1988) (6-3 vote on June 6, 1988); *Penn Mutual Life Ins. v. Department of Licensing & Regulation of the State of Michigan*, 412 N.W. 2d 668 (Mich. App. 1987); *OAMCO v. Lindley*, 493 N.E. 2d 1345 (Ohio 1986), *aff'd on reh'g*, 500 N.E. 2d 1379 (Ohio 1987), *clarified, substituted op., in part*, 503 N.E. 2d 1388 (Ohio 1987); *First of McAlester Corp. v. Oklahoma Tax Comm'n*, 709 P.2d 1026 (Okla. 1985); and *Metropolitan Life Ins. Co. v. Commissioner*, 373 N.W. 2d 399 (N.D. 1985).

In its holding of "pure prospective application" from June 23, 1987, the date of this Court's decision in *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. 2810 (1987), the Washington Supreme Court determined that "for purposes of applying the refund statutes it is as if the taxes collected pre-*Tyler* were constitutionally collected." *National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d at 1287. However, it has long been established that "[t]he retention by the state of an unconstitutional tax is as much a violation of the Constitution as was the collection of tax in the first instance. *See, Carpenter v. Shaw*, 280 U.S. 363, 369, 50 S. Ct. 121, 123, 74 L.Ed. 478 (1930)." *United States v. State Tax Comm'n of Mississippi*, 645 F.2d 4, 5 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981).

The purpose of the prospectivity holdings adopted by the courts below is to deny the taxpayers the remedy to which they are constitutionally entitled. The wave of similar, recent unconstitutional "prospective only" holdings is affecting our member companies in many parts of this Nation. If permitted to stand, findings of unconstitutional state taxation by this Court will become meaningless in these jurisdictions.

By this motion, COST seeks leave to show that judicial decisions of unconstitutional state taxation should apply to all taxpayers for all open years, to prevent inequity and protect the constitutional rights of interstate taxpayers.

COST therefore urges that leave be granted to file a brief as *amicus curiae* and respectfully so moves the Court.

Respectfully submitted,

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Dated: January 6, 1989

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On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as

amicus curiae in support of Petitioners in the above-captioned cases.

INTEREST OF *AMICUS CURIAE*

The interest of the Committee on State Taxation of the Council of State Chambers of Commerce is set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae*.

SUMMARY OF ARGUMENT

An increasing number of States have given "prospective only" effect to decisions of unconstitutional state taxation in order to avoid refunds and to allow continued collection of such taxes after they have been invalidated. State courts have applied their own standards to justify their prospective rulings. While *amicus* believes the three-pronged test established by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), as governing consideration of whether to impose a decision prospectively only, should be abandoned in favor of the standards set forth in *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), even the inadequate standards of *Chevron* have not been followed. A balancing of equities in determining the taxpayers' remedy for the imposition of an unconstitutional tax has been ignored. Taxpayers' rights to recover unconstitutionally-exacted taxes have been extinguished and States are retaining the revenues collected under unconstitutional laws.

Just as in the area of criminal litigation, application of the prospectivity standards of *Chevron* in the civil tax area has generated incompatible rules and inconsistent principles. This Court should adopt the *Griffith* rule and thereby apply decisions of unconstitutional or illegal state taxation to similarly-situated taxpayers for all open years. In the event the rule of *Griffith* is not extended to non-final civil tax cases, clarification by this Court is

needed as to the scope of the prospectivity doctrine and the appropriate standards governing determinations of non-retroactive application of judicial decisions invalidating state taxes as unconstitutional under the United States Constitution.

Guidance by this Court is needed to assure a consistent and fair system of taxation throughout the nation which will (1) allow each State to receive its just share of the total tax contribution of the nation's business sector, (2) prevent inequity and (3) protect the constitutional rights of interstate taxpayers.

ARGUMENT

DECISIONS OF UNCONSTITUTIONAL OR ILLEGAL STATE TAXATION SHOULD APPLY EQUALLY TO SIMILARLY-SITUATED TAXPAYERS FOR ALL OPEN YEARS

The rule of limited retrospectivity—that a change in law must, at a minimum, be given effect while a case is pending on direct review was established in *United States v. The Schooner Peggy*, 1 Cranch 103 (1801). While this principle was applied in *Schooner Peggy* where the intervening change in law involved a treaty, this same approach has been applied in cases where a change in law is made by statute, *Bradley v. School Board*, 416 U.S. 602 (1960); *United States v. Alabama*, 362 U.S. 602 (1960) (per curiam); *Ziffrin, Inc. v. United States*, 318 U.S. 73 (1943); *Carpenter v. Wabash Ry.*, 309 U.S. 23 (1940); by constitutional amendment, *United States v. Chambers*, 291 U.S. 217 (1934); by judicial decision, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Moores v. National Bank*, 104 U.S. 625 (1882); and where the change in law is "constitutional, statutory or judicial", *Thorpe v. Housing Authority*, 393 U.S. 268, 282 (1969).

The rule of *Schooner Peggy* was noted as being applicable in both civil and criminal litigation in *Linkletter v. Walker*, 381 U.S. 618 (1965) when this Court adopted the first of its modern retroactivity tests for cases involving application of new constitutional rules. The three-pronged test established therein applied to criminal litigation and required a "weigh[ing] of the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. at 629.

A separate standard for governing questions of retroactive application of new rules of law in civil cases was enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Three factors were established as relevant in determining whether a decision should have nonretrospective effect:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard this operation . . . . Finally, we have weighed the inequity imposed by retroactive application for where a decision of this court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice of hardship by a holding of nonretroactivity." [Citations deleted.] 404 U.S. at 106-107.

Application of the retrospective standards of *Linkletter* generated incompatible rules and inconsistent principles and thus in *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), this Court adopted Justice Harlan's approach to retro-

activity propounded in *Desist v. United States*, 394 U.S. 244, 256 (1969) (dissenting opinion), and in *Mackey v. United States*, 401 U.S. 667, 675 (1971). The Court held in *Griffith* that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final with no exception for cases in which the new rule constitutes a 'clear break' with the past." 107 S. Ct. at 716. Thus, the Court has abandoned its efforts, at least in the area of criminal litigation, to deviate from the established principle under the *Schooner Peggy* line of cases that new rules of law should be applied retroactively to non-final cases.

While it was noted in *Griffith* that the area of civil retroactivity "continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*", 107 S. Ct. at 713 n.8, the rationale for eliminating deviating retrospective rules applies equally here. This Court rejected any exception for a new rule which is a clear break with the past for the same reasons that failure to apply a newly-declared rule to non-final cases violates basic norms of constitutional ajudication:

> "First, it is a settled principle that this Court adjudicates only 'cases' and 'controversies'. *See* U.S. Const. Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedures on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, *the integrity of the judicial review requires that we apply the rule to all similar cases pending on direct review.*"
>
> • • • •
>
> "[*W*]*e fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final.* Thus, it is the nature of judicial review that precludes us from '[s]imply

fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.' "

"Second, *selective application of new rules violates the principle of treating similarly situated defendants the same.* As we pointed out in *United States v. Johnson*, the problem with not applying new rules to cases pending on direct review is 'the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule. Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: 'The time for toleration has come to an end.' " [Citations deleted; emphasis supplied.] 107 S. Ct. at 713-714.

Indeed, Justice Harlan cautioned the Court in *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970) (Harlan, J., concurring), that certain distinctions suggested in civil cases, such as between clear and ambiguous statutes, decisions construing statutes for the first time, decisions overruling prior constructions of statutes, may lead the Court to a "retroactivity quagmire" similar to that which it has just escaped in the criminal field. 397 U.S. at 295. In Justice Harlan's view, new rules of law should be applied retrospectively also in non-final civil cases, there being no justification for applying principles, constitutional or otherwise, determined to be wrong to litigants who are or may still come to court. Consistent with his approach to criminal retroactivity adopted by this Court in *Griffith*, "the underlying substantive principle [is] that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them." 397 U.S. at 297. It is again that time called for by Justice Harlan when " 'Retroactivity' must be rethought." 107 S. Ct. at 712.

The question of the retroactive effect of judicial decisions of unconstitutional state taxation, such as that presented in the instant cases, is a significant and recurring issue, affecting hundreds of interstate taxpayers. *See National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d 1286 (Wash.), *appeal dismissed, cert. denied*, 108 S. Ct. 2030 (1988); *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. 2810, 2822-2823 (1987); *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829, 2847-2848 (1987); *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W. Va. 1986), *appeal dismissed for want of final judgment*, 107 S. Ct. 1949 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), *reh'g denied*, 469 U.S. 912 (1984); *Salorio v. Glaser*, 461 A.2d 1100 (N.J.), *cert. denied*, 464 U.S. 993 (1983). A similar retroactivity issue is presented by the appellant in *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W. Va. 1986), *appeal docketed*, No. 88-421.

It is clear that an increasing number of States are relying on the prospectivity doctrine to avoid refunds of unconstitutional or illegal taxes. It is equally clear that the states' use of the prospective doctrine to extinguish a taxpayer's right to a refund of unconstitutional state taxes has produced myriad problems. *See also Penn Mutual Life Ins. Co. v. Department of Licensing & Regulation of the State of Michigan*, 412 N.W. 2d 668 (Mich. App. 1987); *OAMCO v. Lindley*, 493 N.E. 2d 1345 (Ohio 1986), *aff'd on reh'g*, 500 N.E. 2d 1379 (Ohio 1987), *clarified, substituted op., in part*, 503 N.E. 2d 1388 (Ohio 1987); *First of McAlester Corp. v. Oklahoma Tax Comm'n*, 709 P.2d 1026 (Okla. 1985); *Metropolitan Life Ins. Co. v. Commissioner*, 373 N.W. 2d 399 (N.D. 1985). *But see Burlington Northern R.R. Co. v. Board of Supervisors*, 418 NW. 2d 72 (Iowa 1988) (prospective effect not given federal circuit court holding that Iowa's statutory scheme for taxing personal property of a railroad

contravened a federal statute); *American Trucking Ass'ns, Inc. v. Conway*, No. S-14786WnC (Vt. Super. Ct. Feb. 11, 1988), *appeal docketed*, No. 88-156 (Vt. Sup. Ct.) (holding of unconstitutional truck decal taxes under *Scheiner* not applied prospectively since the issue had been resolved in state court in 1983 and thus the taxpayers are entitled to the refund of escrowed tax payments); *American Trucking Ass'ns, Inc. v. Kline*, No. 07-14-1667-85MVT (N.J. Tax Ct. Sept. 8, 1988) (taxpayers entitled to refunds of truck decal taxes since no justification existed for enactment in 1984 of obviously discriminatory taxes).

A purely "prospective only" ruling applies to all taxpayers, including the successful litigants, regardless of whether refund claims and assessments are pending or on appeal before any administrative body or court. However, state courts have also applied decisions of unconstitutional or illegal taxation retroactively to only the successful taxpayer litigants, *see Ashland Oil, Inc. v. Rose, supra; OAMCO v. Lindley, supra;* to only those taxpayers who are parties to pending litigation, *see Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982); or to only those taxpayers who have actions pending before any administrative body or court in the State, *see Kansas City Millwright Co., Inc. v. Kalb*, 564 P.2d 1281 (Kan. 1977); and applied the decision prospectively as to all other taxpayers.

State courts have generally applied their prospective holdings of unconstitutional state taxation effective from the date of judgment even though the taxes were invalidated under a prior decision of this Court. *But see First of McAlester Corp. v. Oklahoma Tax Comm'n, supra* (decision invalidating state bank tax as unconstitutional under *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983) effective from January 24, 1983, the date of this Court's decision). Thus, the State can retain all unconstitutional taxes assessed or collected prior to this

Court's decision and continue to assess and collect the unconstitutional taxes subsequent to this Court's decision until issuance of its own prospective decision. In effect, the State is not only applying the Court's decision prospectively but postponing prospectivity until a later date. State courts have even permitted continued collection of the invalid and unconstitutional tax for a period of time after the prospective decision where the decision is to become effective at some future date. *See Salorio v. Glaser, supra* (prospective effective date of holding Emergency Transportation Taxes unconstitutional delayed to allow the taxing authorities to collect the tax until January 1, 1984, almost six months later). *But see American Trucking Ass'ns, Inc. v. Goldstein*, 541 A.2d 955 (Md. 1988) (trial court erred in postponing effective date of its holding that Maryland decal fee was unconstitutional under *Scheiner* to July 1, 1988 to allow state collection through current fiscal year).

This Court's decisions of unconstitutional state taxation in *Tyler Pipe* and *Armco* have been given immediate prospective effect by the respective courts below, *National Can Corp. v. Washington Dep't of Revenue, supra; Ashland Oil, Inc. v. Rose, supra;* however, an issue raised by the appeal in *Ashland* is whether the taxpayer is even seeking retroactive application of the *Armco* decision. Questions as to what is the operative event in determining whether a prospective or retroactive remedy for unconstitutional state taxation is being sought have also arisen recently in other cases where the state tax administrator has sought retention or collection of the unconstitutional taxes after this Court's decision. *See Midland Bank & Trust Co. v. Olsen*, 717 S.W. 2d 580 (Tenn. 1986) (refunds of taxpayers' 1982 corporate excise taxes mandated by *Memphis Bank* did not involve retroactive application of that decision since the taxpayers' cause of action did not accrue until the 1982 taxes were due and paid under protest which occurred after the decision was

rendered); *American Trucking Ass'ns, Inc. v. Goldstein, supra* (retrospectivity not at issue since the tax obligation did not occur until approximately January 1, 1988, more than six months after the date of this Court's *Scheiner* decision).

The three-pronged test established by this Court in *Chevron* governs determinations in civil cases of whether a decision should be applied prospectively. *See Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. at 2822-2823 (1987); *Griffith v. Kentucky*, 107 S. Ct. at 713 n.8 (1987). *See also American Trucking Ass'ns, Inc. v. Smith*, 746 S.W. 2d 377 (Ark. 1988), *cert. granted*, —— U.S. ——, No. 88-325; *National Can Corp. v. Washington Dep't of Revenue, supra; First of McAlester Corp. v. Oklahoma Tax Comm'n, supra.* Nevertheless, many state courts have applied their own criteria for prospective application of a decision holding a state tax unconstitutional, *see Ashland Oil, Inc. v. Rose, supra* (West Virginia Supreme Court applied state standards in ruling this Court's *Armco* decision should be given prospective effect only), and typically rest their prospective holdings on "equitable considerations" of the state's reliance on the overturned taxing statute for revenue and the great financial hardship on the State if retroactive effect were allowed, *see Penn Mutual Life Ins. Co. v. Department of Licensing and Regulation, supra; Metropolitan Life Ins. Co. v. Commissioner, supra; Salorio v. Glaser, supra*; or that the taxpayers, if given a refund, would "in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So.2d 1000, 1010 (Fla. 1988), *cert. granted*, —— U.S. ——, No. 88-192. *See also Metropolitan Life Ins. Co. v. Commissioner, supra* (pass-on defense insufficient alone to deny a refund of unconstitutional taxes but may be considered in weighing the equities in a prospectivity determination). However, many

state courts find the pass-on argument lacking in merit. *See American Trucking Ass'ns, Inc. v. Conway, supra* ("Equity supports giving that windfall, if it exists, to the wronged plaintiffs."); *American Trucking Ass'ns, Inc. v. Kline, supra* ("I cannot conclude that plaintiffs will receive a windfall if a refund is granted. As between the State, which enacted a tax which was unconstitutional, and the taxpayers who were forced to pay this tax, the latter have the superior equitable claim.")

Furthermore, the three-pronged *Chevron* test has been given varying interpretations by the States as to the proper weight to be given each factor and as to the correct analysis required in applying the test to determine whether a decision of unconstitutional state taxation has declared a "new principle of law". The first *Chevron* factor requires that if a decision is to be applied prospectively only, it must have established a new principle of law by either overruling clear past precedent on which litigants may have relied or deciding an issue of first impression whose resolution was not clearly foreshadowed. This Court has stated that in civil cases this " 'clear break' principle has usually been . . . the threshold test for determining whether or not a decision should be applied nonretroactively." *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982). Some States have applied the "clear break" principle as the threshold requirement in their prospectivity determinations, *see National Can Corp. v. Washington Dep't of Revenue, supra; First of McAlester Corp. v. Oklahoma Tax Comm'n, supra;* while others have given equal weight to all three *Chevron* factors, *see American Trucking Ass'ns, Inc. v. Smith, supra.*

State courts have also applied varying standards in determining whether a decision has established a "new principle of law" under the first *Chevron* criterion. In its ruling that this Court's decision in *Scheiner* should apply prospectively only, the Arkansas Supreme Court

found this aspect of the *Chevron* test was satisfied because *Scheiner* "declared invalid a tax which a reasonable person could easily have found to pass Commerce Clause muster upon examination of *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs of Montana*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935), in which 'flat' highway taxes were held not violative of the Commerce Clause." *American Trucking Ass'ns, Inc. v. Smith*, 746 S.W. 2d at 378-379. *Cf. McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So.2d at 1010 (prospective application of holding of unconstitutional tax preference scheme under this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), justified because tax was collected by division in good faith reliance on presumptively valid statute). *But see American Trucking Ass'ns, Inc. v. Kline, supra* (holding of unconstitutional truck decal taxes under *Scheiner* not applied prospectively since this decision was clearly foreshadowed by this Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)).

The Washington Supreme Court finding in *National Can* that this Court's *Tyler Pipe* decision established a new principle of law overruling past precedent on which litigants may have relied was based on "[the Washington Supreme Court's] unanimous decision in *National Can* and *Tyler Pipe*, the long line of [Washington Supreme Court] cases upholding the Washington B & O tax, the fact that *Tyler* overruled past precedent on which the states may have relied, and Justice Scalia's dissent in *Tyler*", *National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d at 1288, even though the holding was "clearly foreshadowed" by the Department of Revenue at least by the time this Court issued its decision in *Armco* on June 12, 1984, *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. at ——. *See also First of McAlester Corp. v. Oklahoma Tax Comm'n*, 709

P.2d at 1036 ("Although the new principle of law established in *Memphis Bank* might be characterized as merely a progression from former decisions, it was not foreseen by the Commission, nor by the Oklahoma Legislature."). The West Virginia Supreme Court of Appeals, applying standards similar to those in *Chevron*, relied principally on this Courts' dismissal of the appeal in *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982), involving a similar wholesale gross receipts tax, for its conclusion that this Court's *Armco* decision "represented a reversal of prior precedent". *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d at 536.

A question raised by these cases is whether the standards applied by the state courts satisfy *Chevron*'s "new principle of law" or "clear break" with precedent requirement. It has long been clear that the Commerce Clause prohibits taxes which favor local business over interstate commerce. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 415 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987); and *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. 2810 (1987). Despite the clarity of this principle, attempts to circumvent it are limited only by the imagination and the energy of state tax collectors. If a judicial decision of unconstitutional state taxation involves large potential refunds for many taxpayers, it is probable that no refunds will be granted. State courts have applied varied prospectivity standards to allow the States to retain the revenues collected under an unconstitutional tax.

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, there was clearly neither a "new principle of law" nor a "clear break" with precedent. There was nothing more than a transparent attempt to circumvent

the Court's decision in *Bacchus*. In *American Trucking Ass'ns, Inc. v. Smith*, there was also neither a "new principle of law" nor a "clear break". Both cases represent the worst side of government—flagrant attempts to collect and retain taxes which the government knows are unconstitutional. Some States even assert penalties for failure to pay unconstitutional taxes. What could be more outrageous?

The rationale of this Court in *Griffith* for abandoning the prospectivity doctrine in non-final criminal cases is as compelling in civil tax cases. Just as in criminal cases where substantial conceptual difficulties arose by not applying new rules retroactively, application of the prospectivity standards of *Chevron* has generated incompatible, unworkable rules and inconsistent principles which are often ignored at lower levels. In cautioning against this "retroactivity quagmire", similar to which the Court has just escaped in the criminal field, Justice Harlan also reasoned:

> "The impulse to make a new decisional rule nonretroactive rests, in civil cases at least, upon the same considerations that lie at the core of *stare decisis*, namely to avoid jolting the expectations of parties to a transaction. Yet once the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to litigants who are in or may still come to court. The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. Just as in the criminal field the crucial moment is, for most cases, the time when a conviction has become final, see my *Desist* dissent, *supra*, so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*. Any uncertainty engendered by this approach should, I think, be deemed part of the risks of life." *United States v. Estate of Donnelly*, 397 U.S. at 295-296 (Harlan, J., concurring).

Adoption of Justice Harlan's view of uniform retroactive application of new decisional rules in civil cases unless a transaction is beyond challenge because of a bar of *res judicata* or statute of limitations would avoid this retroactivity quagmire and comport with basic norms of constitutional adjudication and the principle of treating similarly situated taxpayers similarly, the same considerations underlying this Court's decision in *Griffith*.

In the event this Court declines to adopt Justice Harlan's approach as to the retroactive application of judicial decisions of unconstitutional state taxation, guidance by this Court is needed as to the scope of the prospectivity doctrine and the appropriate standards governing determinations of non-retroactivity. State courts have applied their own criteria for their prospective decisions. The *Chevron* test has proven to be unworkable, resulting in varying interpretations by the States. Different standards have been applied in determining whether a decision of unconstitutional state taxation has established a "new principle of law" under the first *Chevron* criterion, producing contrary conclusions between States with respect to the very same decision of unconstitutionality issued by this Court. States are also divided as to whether application of decisions invalidating discriminatory state taxes further or retard operation of the Commerce Clause. Equitable considerations are frequently biased in favor of the State which enacted the unconstitutional tax, thereby permitting the State to retain and continue to collect revenues under the unconstitutional law. Taxpayers' rights to illegally-collected taxes under this Court's recent decisions of unconstitutionally discriminatory state taxation are dictated, not by meaningful and dependable

standards for determining retrospective application of the enunciated constitutional rules, but by the individual state court's proclivities. This Court, if it determines that the prospectivity doctrine continues to apply in the area of civil tax litigation, should make it clear that non-retroactivity of decisions of unconstitutional state taxation is governed by the *Chevron* test and provide a meaningful interpretation of the *Chevron* standards. The better result would be the replacement of the *Chevron* standards with the *Griffith* standards.

CONCLUSION

For the foregoing reasons, this Court should (1) reverse the decisions below, (2) order the respective agencies to pay the disputed tax refunds, and (3) rule that the *Griffith* standards are being extended to civil tax cases.

Respectfully submitted,

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Dated: January 6, 1989

Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-325

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners
v.
MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE STATES OF VERMONT, CONNECTICUT AND NEW JERSEY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-325

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE STATES OF VERMONT, CONNECTICUT AND NEW JERSEY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Pursuant to Rule 36 of the Rules of this Court, the States of Vermont, Connecticut and New Jersey, by their Attorneys General, respectfully submit this Brief as *amici curiae* in support of Respondents.

INTEREST OF THE AMICI CURIAE

In *American Trucking Associations, Inc. v. Scheiner*, 107 S.Ct. 2829 (1987), the Court held unconstitutional certain flat highway user fees ("flat fees") imposed by states on motor carriers. These fees were specifically

dedicated to fund transportation facilities and were invalidated for not being proportional to the services rendered by the state. This case presents the issue, remanded to the Pennsylvania Supreme Court in *Scheiner*, 107 S.Ct. at 2847-2848, whether the rule announced in *Scheiner* should be applied prospectively only or retroactively, so as to require the refund of fees or taxes collected prior to the effective date of *Scheiner*.

Vermont, we believe, is unique among the states presently in litigation with American Trucking Associations, Inc. ("ATA") over the prospective application of *Scheiner*. In *ATA v. Conway*, [Vt.] St. Tax Rep. (CCH) para. 200-306 (Vt. Super. Ct., Washington Co., Feb. 11, 1988), on appeal, No. 88-156 Vt. Sup. Ct.), a single trial judge, by interim relief, established an escrow of Vermont's "flat fees" in April, 1986. At that time this Court's numerous precedents consistently upheld the validity of "flat fees." Vermont and other states relied on their validity.

In addition to Arkansas and Pennsylvania, at least Vermont, New Jersey, and Kentucky have the identical issue pending or soon to be raised in state supreme courts. It is unlikely the Vermont Supreme Court will decide the Vermont case before this Court rules in the instant case. This Court's disposition of ATA's challenge to the Arkansas Supreme Court decision may affect the disposition of the pending case before the Vermont Supreme Court.

INTRODUCTION AND SUMMARY

Scheiner should be held to apply prospectively only. The realization that the Constitution is silent on the question of prospectivity/retrospectivity dates at least to the decision of *Great Northern Ry. Co. v. Sunburt Oil & Refining Co.*, 287 U.S. 358 (1932). Since then the Court has applied decisions prospectively only many times in civil cases; the Court has also developed criteria to assess

whether decisions should be applied prospectively. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). State courts have adopted the *Chevron* test, *Solomon v. Atlantis Development, Inc.*, 145 Vt. 70, 483 A.2d 253 (1984) and, in addition to the instant case the application of the *Chevron* test has played a central role in cases brought to the Court, e.g., *National Can Corp. v. Washington Dept. of Revenue*, 749 P.2d 1286 (Wash.) *appeal dismissed, cert. denied*, 108 S.Ct. 2030 (1988) and *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W.Va. 1986), *appeal docketed*, No. 88-421.

The facts of the instant case do not lend themselves to a reconsideration of the *Chevron* test, which is still valid and should survive, but the Court *is* presented with a case for identification of appropriate events that can serve as the "break point" for prospective application of *Scheiner* and other appropriate cases.

There can be no doubt that *Scheiner* overruled clear past precedent on which the states and Petitioners relied. "Flat fees" were an economic fact of life in interstate commerce sanctioned by the Court from 1916 until *Scheiner*. See *Kane v. New Jersey*, 242 U.S. 160 (1916). Such fees are still levied on trucks in interstate commerce by Congress. Federal Heavy Vehicle Use Tax, § 4481 et seq. of the Internal Revenue Code of 1954, 26 U.S.C. § 4481 et seq. And every state imposes "flat fees" in the form of registration fees on virtually all vehicles regardless of the number of miles traveled. But even if the Court determines *Scheiner* did not establish new law by overruling clear past precedent, the decision cannot be said to have been foreshadowed. The watershed case of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) and the case it overruled, *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951) concerned taxes on the "privilege" of doing business in a state and not the use of a state's highways. This distinction is pointed up by the favorable citation of the *Aero Mayflower* line of "flat

fee" cases in *Massachusetts v. United States*, 435 U.S. 444 (1978), upholding a minimum "flat fee" on aircraft, and the exclusion of the issue from another "privilege" tax case, *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981) several years *after Complete Auto.*

Prospective-only application of *Scheiner* will fully serve the purpose of the new rule. *Scheiner* has removed any barriers to free trade among the states that "flat fees" may have presented. Retrospective application would not provide the ability to turn back the clock to reverse any discrimination and barriers that formerly existed. Furthermore, the requirement of refunds would free petitioners and their class from the permissible burden of paying their share of taxes needed to construct and maintain state highway systems.

Substantial "injustice or hardship" will occur in several states if *Scheiner* is applied retrospectively. Several hundreds of millions of dollars in fees, plus interest, are at stake in the several states in litigation with ATA. States will be forced to refund this money unless the Court determines they were entitled to rely on the precedents and/or lack of foreshadowing of *Scheiner*. The Court has recognized that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct," *Lemon v. Kurtzman* (Lemon II), 411 U.S. 192 at 199 (1973), and that "(u)ntil judges say otherwise, state officers . . . have the power to carry forward the directives of the state legislature." *Id.* at 208. Now that the Court has "said otherwise," the states no longer have a justifiable "reliance interest" in earlier Court opinions validating "flat fees."

Other equitable considerations requiring prospective-only application of the new *Scheiner* rule are:

1. Any harm to petitioners was *de minimus*.

2. Petitioners have consistently *not* argued that "flat fees" were excessive.

3. Truckers did in fact "pass on" the costs of "flat fees" to their customers.

4. Large trucks have consistently been paying less than their cost responsibility to the states.

5. Truckers have and will continue to benefit directly from the expenditure of the "flat fees" for the construction and maintenance of highways, the truckers' very lifeblood.

Finally, to illustrate that treatment of "flat fees" and prospectivity by other states and courts vary greatly from the instant case, the chronology and lessons from the Vermont and New Jersey experiences are presented. The Court will see facts far different from those in the instant case, facts that show why the new rule in *Scheiner* should be applied prospectively only.

I. THE COURT'S DECISION IN *SCHEINER* SHOULD BE EFFECTIVE PROSPECTIVELY ONLY BECAUSE IT OVERRULED CLEAR PAST PRECEDENT ON WHICH THE LITIGANTS RELIED AND RETROSPECTIVE APPLICATION WILL NOT FURTHER OPERATION OF THE NEW RULE, BUT WILL PRODUCE SUBSTANTIAL INEQUITABLE RESULTS.

The issues before the Court are whether Arkansas, and ultimately several other states with identical and similar issues pending in state courts, must make refunds to non-domestic truckers (the petitioners) who paid flat highway user fees, ("flat fees") pursuant to state law, and, if so, as of what date.

While courts initially adopted the common law doctrine that an invalidated statute must be deemed a nullity from the moment of its adoption (". . . in legal contemplation

as inoperative as though it had never been passed" (*Norton v. Sheldon County*, 118 U.S. 425, 442 [1886]), the rigidity of the rule and the impractical and harsh results which it compelled in invalidating all past transactions made in reliance upon a purportedly legitimate statute led the Court in *Chicot Co. Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), to reason that the "broad statements" of absolute retrospective invalidity espoused in *Norton* were unjustified:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. . . . Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. [308 U.S. at 374.]

Synthesizing the concerns expressed in *Chicot*, the Court in *Chevron*, *supra*, in 1971 set forth three factors which govern modern prospectivity/retroactivity analysis in civil cases:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, . . . "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, 381 U.S. 618, at 629 (1965). Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity." [404 U.S. at 106-7, citations omitted.]

The *amici* would emphasize that the first or threshold factor in *Chevron* is disjunctive. The establishment of a new principle of law is required. But this can be "either by overruling clear past precedent . . ." *or* by "deciding an issue of first impression. . . ." *Id.*

A. The *Chevron* Test Is Still Valid.

Petitioners have not set forth any reasons why the *Chevron* test is inappropriate or outmoded. The actions of Arkansas and orders of its supreme court in the instant case, and Florida's legislature in Case No. 88-192, do not bring to the Court the question of the propriety or validity of the *Chevron* test. For, regardless of the factors in any test sanctioned by the Court, proper application will depend on the ability, objectivity, and integrity of those applying it.

The *Chevron* test is still valid and should survive. It should *not* be constricted and made more difficult to apply based on different, though compelling, interests of justice in criminal procedure cases. See, *Griffith v. Kentucky*, 107 S.Ct. 708 (1987). The second and third factors of the *Chevron* test provide for the *ad hoc* analysis necessary when a new rule of law is established under one of the alternative thresholds of the first factor.

With proper application, and a valid determination of prospectivity, the Court does, however, need to adopt a rule or establish guidelines to set the proper date for prospective application. Depending on the case-specific facts, the date of prospective application will vary. Possible dates include:

1. The opinion date.
2. The date of the mandate.

3. The date petitioners sought to enforce *Scheiner*.

4. The date a local tribunal provided for timely enforcement.

B. *Scheiner* Overruled Clear Past Precedent on Which the Litigants Relied.

The first factor of the *Chevron* test sets forth alternative thresholds. For the "flat fee" issue, *Scheiner* "established a new principle of law . . . by overruling clear past precedent on which the litigants have relied." *Chevron, Id.* at 106. Thus *Chevron's* threshold factor is satisfied.

The petitioners are unable to cite a single case where the Court overturned facially neutral "flat fees" that were not excessive in amount prior to *Scheiner*. A long list of court opinions upholding flat fees begins with *Kane v. New Jersey, supra,* in 1916, includes the first *Aero Mayflower* case, *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n,* 295 U.S. 285 (1935), and culminates with *Capitol Greyhound Lines v. Brice,* 339 U.S. 542 (1950). Furthermore, as noted by Justice O'Connor in her dissent in *Scheiner* the *Aero Mayflower* line of cases was "apparently cited with approval as recently as *Massachusetts v. United States,* 435 U.S. 444, 463-464," which was decided in 1978. *Scheiner,* 107 S.Ct. at 2848. In 1981, in *Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981), the Court at 622, n. 12 put aside from its consideration " 'user' fees or 'taxes' that were designed and defended as a specific charge imposed by the state for use of state-owned or state-provided transportation . . . facilities." Given this history of "flat fees," it is inconceivable that an objective observer could determine other than that *Scheiner* overruled clear past precedent.

C. Petitioners Espouse the Inapplicable and Unnecessary Alternative From *Chevron's* First Factor and Do So Inaccurately.

Petitioners have attempted to persuade the Court that the *Chevron* test is not applicable to *Scheiner*. But citations to *Complete Auto* and *Commonwealth Edison* as authority that the *Scheiner* decision was foreshadowed are misplaced, even assuming the alternative "foreshadowing" alternative of the first factor in *Chevron* is applicable.

Close analysis of *Complete Auto* and the case it overturned, *Spector Motor Service v. O'Connor, supra,* shows those cases *expressly* were not intended to consider the *Aero Mayflower* "flat fee" cases. *Complete Auto* considered *only* the constitutionality of the so-called "privilege" taxes, i.e., where a state imposed a tax on a foreign corporation simply for the privilege of doing business in the state. The *Aero Mayflower* "flat fee" cases dealt with user fees for the specific use of a state's highways or other facilities. Moreover the two separate lines of cases made special effort to keep the two different types of taxes or fees separate.

In *Aero Mayflower Transit Co. v. Board of Railroad Commissioners,* 332 U.S. 495 (1947), at 504, the Court said:

> Appellant therefore confuses a tax "assessed for a proper purpose and . . . not objectionable in amount" . . . that is, *a tax affirmatively laid for the privilege of using the state's highways, with a tax not imposed on that privilege but upon some other such as the privilege of doing interstate business.* Though necessarily related in view of the nature of interstate motor traffic, the two privileges are not identical . . . (emphasis added)

Four years later, in 1951, the Court noted in *Spector, supra,* at 340 U.S. 606:

> There is no ground upon which the tax can be said to rest upon the use of highways by motor trucks. . . .

The Court went on: "The tax is not levied as compensation for the use of highways." *Id.* at 607, and then in footnote 4 the Court cited to *Aero Mayflower, Id.* at 607, and other flat fee cases as examples of valid highway user taxes.

Likewise, thirty years later in *Complete Auto* the tax challenged was for the *privilege of doing interstate business.* 430 U.S. at 274. The Court presented a lengthy discussion of the cases involving "privilege taxes," *Id.* at 279-283, yet none of the discussion focused on the "flat fee" cases, which involved taxes specifically for the use of state highways.

Thus, the Court in *Complete Auto* specifically kept alive the distinction between cases involving "privilege taxes" and cases involving taxes levied as compensation for the use of highways.

This was made clear again in *Commonwealth Edison,* when in 1981 the Court applied the *Complete Auto* test to a "privilege tax." In noting the difference between the two types of taxes the Court stated:

> Consequently, in reviewing appellant's contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees, or "taxes" that were designed and defended as a specific charge imposed by the state for use of state-owned or state-provided transportation or other facilities and services. . . . As the Court has stated "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes."

Commonwealth Edison, supra, 453 U.S. at 621, 622, n. 12.

Contrary to "foreshadowing" *Scheiner, Complete Auto* and *Commonwealth Edison* clearly kept alive the distinction between "privilege taxes" and "user fees." The new rule as to the former in *Complete Auto* provided no clues to conscientious state administrators that "flat fees" would be struck down eleven years later.

In order to function in modern society state officials and others must be able to rely on the Court's procedents until they are overruled or altered by statute. This is so even if one applies the second alternative (foreshadowing) from *Chevron*'s first factor:

> A decision that overrules much-criticized precedent may well have been clearly foreshadowed. . . . Our cases indicate that even in this situation authorities are generally entitled to rely on existing case law, whatever its disrepute. *Solem v. Stumes,* 465 U.S. 638, at 646, n. 6 (1984).

D. Prospective-Only Operation Fully Serves the Purpose and Effect of the New *Scheiner* Rule.

In the second factor of the *Chevron* test the Court must

> . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. *Chevron, supra,* 404 U.S. at 107.

The history is helpful in this analysis. "Flat fees" were permissible and constitutional so long as they were not excessive. The purposes included providing the states the ability to run their financial affairs regarding highways as best fit their fiscal and administrative needs so long as the level of taxes was not excessive and to have interstate commerce pay its fair share of the tax burden. The new rule, set in the central purpose of the Commerce Clause, is intended to create an area of free trade among states, *Scheiner,* 107 S.Ct. 2829 at 2838, *and* allow for interstate commerce to be made to pay its fair share of the tax burden. *Complete Auto,* 430 U.S. 274, at 288.

It is impossible for retrospective application of the new rule to "encourage free trade among the states since whatever chill was imposed on interstate trade is in the past" and all affected states have discontinued collecting the offending fees. See *National Can Corp. v. Dept. of Revenue, supra.*

Furthermore, if the Court affords retroactive application and requires refunds in Arkansas prior to *Scheiner*, foreign-registered trucks will escape responsibility for their share of the tax burden. Upon extension to pending cases in other states the petitioners and others will reap further enormous windfalls. Retroactive application with refunds of all "flat fees" would create an open or "window" period of fee-free time for out-of-state motor carriers to the detriment, at least in some of the states, of those whose trucks are registered in-state.

"Flat fees" that do not meet the test set forth in *Scheiner*, 107 S.Ct. at 2847, are *now* known to be impermissible. By application of *Scheiner* states can *prospectively* adopt fees that will serve to have interstate commerce pay its share of tax burdens while not running afoul of the central Commerce Clause purpose.

Also, the central purpose of the Commerce Clause—free trade among the states—cannot be enhanced by retroactive application of *Scheiner*. The conduct now determined to be unconstitutional by *Scheiner* has already occurred and cannot be rectified with hindsight. Forcing Arkansas and other states to pay refunds will do nothing to ensure freer trade among the states for the past periods. And retroactive application will discriminate against and be detrimental to other taxpayers by freeing much of interstate commerce from paying its share of the tax burden.

Since the discriminatory nature of "flat fees" on interstate commerce—at least where such fees are revenue

producing as opposed to cost-recovering—is now settled, there is no further potential for states to adopt impermissible flat fees and validly claim a "reliance interest" on long-standing Court opinions. See also *Lemon v. Kurtzman* (*"Lemon II"*, *supra.* Therefore, there can be no validity to the argument that refunds should be ordered as a remedial measure to ensure that the states will not enact discriminatory highway taxes in the future. Even under the illogical assumption that the payment of refunds would affect the thinking of present or future legislatures, there is no valid suggestion that any state has acted in bad faith or will do so in the future in the enactment of "flat fees."

Retrospective application and refunds are not necessary as a reward to petitioners for litigating the "flat fee" issue and as an incentive to others to attack unsound law. As primarily "an institutional litigant . . . with interest in overturning legal rules . . . ," Petitioners —ATA and its Litigation Center—should find "incentive and reward enough in achieving only prospective overruling." Traynor, *"Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility,"* 28 Hastings L.J. 533, 546-547 (1977). And the other petitioners will benefit from prospective application of the new rule.

Lastly, prospective-only application of the Court's decision will not interfere with or retard operation of the new rule. There can be no actual indication in the record that "flat fees" in fact hindered free trade in the past; nor is it possible to show that refunding "flat fees" collected prior to *Scheiner's* effective date will increase such trade in the future. Petitioners have not demonstrated any actual harm; indeed their claim is based on the argument that no harm need be demonstrated because of the argued inherent discrimination of flat fees. At page 8 of its reply brief in *Scheiner*, ATA stated:

> In fact, appellants have never challenged the *level* of either the marker fee or the axle tax. (Emphasis in original.)

The effect of the prior rule—validity of "flat fees"—has now been determined to be discriminatory against interstate commerce. But the Court did not so opine until its *Scheiner* decision on June 23, 1987. Retrospective application of *Scheiner* will neither further the new *Scheiner* rule nor retard the old *Aero Mayflower* rule. If discrimination in fact occurred under the old rule, it has occurred and cannot be reversed; those affected cannot be relieved from any past discrimination. Applying the *Scheiner* decision retrospectively would deplete state coffers without resulting in any freer trade among the states either in the past or the future. In addition, it would allow petitioners to receive windfalls and avoid paying their share of the tax burden to construct and maintain the highways in several states.

E. Equitable Considerations Require Prospective-Only Application of the New *Scheiner* Rule.

The third, and last, part of the *Chevron* test is the weighing of the inequity imposed by retrospective application, for

> (w)here a decision of this Court would produce substantial inequitable results if applied retrospectively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity. *Chevron, supra*, 404 U.S. at 107.

The Court has, a number of times, held legislation unconstitutional and given only prospective effect to its holdings in order to avoid undue administrative or financial burdens on government, e.g., *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Lemon II, Supra; City of Phoenix v. Kulodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

The Court's decision in *Lemon II, supra*, is particularly instructive. In *Lemon v. Kurtzman* (*Lemon I*), 403 U.S. 602 (1971) the Court held that a Pennsylvania statute

under which the state reimbursed private sectarian schools for secular educational services was unconstitutional. The issue then arose regarding the propriety of payments for services rendered prior to the Court's opinion. The lower court enjoined future payments, but permitted the state to pay $24 million to schools for services provided before *Lemon I*. The Court affirmed, stating:

> The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is "among the most difficult of those which have engaged the attention of courts, state and federal. . . ." (Citation omitted.) Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, or prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.'" (Citations omitted.) [S]*tatutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity.* Appellants offer no persuasive reason for confining the modern approach to those constitutional cases involving criminal procedure or municipal bonds, and we ourselves perceive none. (Emphasis added.) *Lemon II, supra*, 411 U.S. at 198-199.

The Court stated that the problem essentially related to "the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional," and that "equitable remedies are a special blend of what is necessary, what is fair, and what is work-

able." *Id.* at 199 (footnote omitted). The Court noted that "reliance interests weigh heavily in the shaping of an appropriate equitable remedy," *id.* at 203, and added:

> Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs are "ratified" by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers . . . have the power to carry forward the directives of the state legislature. Those officials may, in some circumstances, elect to defer acting until an authoritative judicial pronouncement has been secured; but particularly when there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this court has never conceived as an incident of judicial review. We do not engage lightly in post hoc evaluation of such political judgment, founded as it is on "one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law." *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, at 60, 93 S.Ct. 1278, at 1311, 36 L.Ed.2d 16 (1973) (Stewart, J., concurring).

Lemon II, *supra*, at 207-208.

The principles and result of *Lemon II* as it applied to *Lemon I* are equally valid in the present case as it relates to *Scheiner*, for Arkansas and other states were able to follow over six decades of unflinching Supreme Court validation of "flat fees."

In addition, the following equitable considerations also dictate the necessity for prospective-only application of the rule in *Scheiner*.

1. In the absence of a bona fide argument that there has been any harm to petitioners, there is no basis or reason for applying the new rule retrospectively so as to provide refunds. As noted, ATA did not question the reasonableness of the marker fee and axle tax challenged in *Scheiner*.

2. The justified "reliance interest" that grew up around the pre-*Scheiner* rule evinces the inequitable results of retroactive application of the new rule in *Scheiner*. This is evidenced by Justice O'Connor's dissent:

> . . . this particular issue has been settled now for over 50 years and Congress has not seen fit to preempt these taxes by exercising its commerce power, though, of course, it has had recent occasion to consider and reconsider the problems of the trucking industry.
>
> * * * *
>
> . . . the reliance interest sought to be protected by the doctrine of *stare decisis* has grown up around the settled rule. . . . In my view, Pennsylvania, in structuring its program, for financing highway construction and repair, had every reason to rely upon the settled understanding that flat highway taxes reasonably related to the extent of the benefit conferred do not violate the Commerce Clause. *Scheiner*, *supra*, 107 S.Ct. 2848-2849.

3. Balanced against the states' reliance on the "flat fee" cases and the need for the revenues for highway programs is the lack of measurable economic harm to the petitioners. In Vermont and New Jersey, at least, any economic harm suffered by truckers on account of "flat fees" was minute.[1]

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[1] Assuming *only* a thousand miles travelled in a state in a "fee" year (less than eight one-way trips through Vermont on I-89 or

4. Small as this potential financial harm was, ATA has admitted truckers did not in reality bear it. The burden of "flat fees" was passed on to petitioners' customers in the form of higher shipping rates.[2] Having not borne the economic burden of the "flat fees" in the first place, refunds to petitioners will be windfalls.

ATA's admission that truckers do not in fact bear the burden of truck taxes results in the conclusion that "any financial harm suffered by the plaintiffs by virtue of their payment of the tax is negligible at best." *Metropolitan Life Ins. Co. v. Commissioner*, 373 N.W.2d 399, at 412 (N.D. 1985). The equity in relation to providing refunds to reimburse those who paid the "flat fees", thus, does

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I-91), with a tare weight of 30,000 lbs. and payload of only 40,000 lbs. (legal payload capacity would be 40,000 lbs. for a gross vehicle weight of 80,000 lbs.), the additional cost per truck would be only five cents ($.05) per mile of operation and 1.6 miles or .16 cents ($.0016) per pound of payload. In *ATA v. Kline*, No. 07-14-1667-85 MVT (N.J. Tax Co., Sept. 8, 1988) the parties stipulated that the per mile cost to operate in New Jersey during 1984 was approximately 90 cents per mile, and that the $25 decal fee accounted for one to two percent of the cost, i.e., between .9 and 1.56 cents per mile, even less than the Vermont example.

[2] Petitioners, through ATA, have admitted this. In testimony before the Vermont Legislature's Motor Truck Taxation Study Committee on August 26, 1987. ATA's State Government Relations Manager, Cynthia Elliott, testified:

> First of all I would like to clarify where the burden of the trucking industry taxes ultimately falls. When I say the burden of the trucking industry taxes, I refer to those of the interstate trucking industry. The fact is that in the end everyone who uses interstate service provided by trucker, and in the case of Vermont that is 89 percent of your manufacturers and shippers, you eventually pay increased taxes through rate increases. Virtually everyone needs the services of the trucking industries and ultimately everyone pays for them.

Later in her testimony, Ms. Elliott clarified that the burden of Vermont's "flat fee" was not passed on directly, *e.g.*, by a direct add-on to shipping contracts, but rather was passed on over time through rate increases.

not favor retrospective application of *Scheiner* and concomitant refunds to the truckers.

5. The 1982 cost allocation study of the Federal Highway administration ("FHWA") and the ones done by states in the late 1970's and 1980's have determined that large trucks have not been paying their cost responsibility. *Indiana Highway Cost Allocation Study: Final Report*, at 46, FHWA and Indiana Dept. of Highways (1985). Indeed, unchallenged affidavits in the Vermont case (*ATA v. Conway*, Vermont Supreme Court Docket No. 88-156) show that for 1985 large trucks paid, at best, 72% of their cost responsibility to Vermont. At worst, they paid 52%. With similar situations in other states as noted in the *Indiana Study*, denial of pre-*Scheiner* "flat fee" revenues will exacerbate this situation for the period in question.

6. Appellee truckers have benefitted and will continue to benefit directly from the expenditure of the "flat fees" collected. In Vermont and other states the "flat fees" were dedicated to the Transportation Fund by law (19 V.S.A. § 11) and they were used primarily, if not exclusively, for construction, maintenance, and policing of highways. Clearly petitioners have used and intend to use Vermont's highways with their heavy trucks. Their actions show that they do not wish to bear their share of the tax burden, however.

7. "Flat fees" have been an economic fact of life in Vermont and New Jersey for decades. See *State v. Caplan*, 100 Vt. 159 (1927) and *N.J. Stat. Ann.* § 54:39A-10. And the precursor to the most recent "flat fee" in Vermont was in place for 30 years, from 1951 until 1981, when the first Fuel User License Fee (FULF) was adopted. See 23 V.S.A. §§ 415 and 3007. The long-term existence of these "flat fees" demonstrates that they have played an integral role in transportation finances, including construction of the interstate system, and that at

least two states—Vermont and New Jersey—had long-standing reliance interests on the continued validity of "flat fees" prior to the Court's opinion in *Scheiner*.

II. THE HISTORY OF "FLAT FEES" IN VERMONT AND NEW JERSEY ILLUSTRATE THE HARSH RESULTS THAT WOULD FLOW FROM WHOLESALE REVERSAL OR RESTRICTION OF THE *CHEVRON* TEST.

A. New Jersey's "Flat Fee."

New Jersey's truck identification marker fee ("decal fee") was first imposed in 1963 as part of the newly enacted motor fuels use tax. 1963 *N.J. Laws, c.* 44, N.J. Stat. Ann. § 54:39A-10.

When enacted in 1963, the decal fee was $3. 1963 *N.J. Laws, c.* 44, § 10. In 1979 the fee was increased to $6, 1979 *N.J. Laws, c.* 4, § 1, and in 1984 the fee was increased to $25 by 1984 *N.J. Laws, c.* 73, § 34. At all times the fee was identical for New Jersey and out-of-state trucks. There were no challenges to the fee between 1963 and 1984. The 1984 increase in the fee was part of a package designed to fund the New Jersey Transportation Trust Fund Authority Act, the purpose of which is to maintain the state's highway system. The $25 fee went into effect on July 10, 1984, and was challenged on October 31, 1984 by ATA.

ATA initially requested a preliminary injunction, but later withdrew that request and sought an escrow of the decal fee as well as certification of a class of out-of-state based carriers. The New Jersey Tax Court's denial of interim relief and its certification of a class were affirmed on interlocutory appeal.

The parties then proceeded to prepare for trial. Before the Tax Court could rule, this Court handed down its opinion in *Scheiner*.

On August 18, 1987, New Jersey advised the Tax Court and ATA that it could no longer defend the $25 fee in light of *Scheiner*, would stop collecting the fee on the following day, and would voluntarily refund all fees collected after June 23, 1987. New Jersey further advised that it would not refund some $34 million collected from carriers based out-of-state between the July 10, 1984 effective date of the fee increase and June 24, 1987, as it believed the *Scheiner* opinion should have only prospective effect.

The parties then filed supplementary briefs on the prospectivity issue. Additionally, New Jersey retained the services of an economist who supplied a written report and testified in depositions that the economic burden of the decal fee was passed forward within one year at the most to the carriers' customers. ATA contested this assertion with its own expert.

On December 4, 1987, the Owner-Operators Independent Drivers Association ("OOIDA") moved to intervene claiming that in many cases where truckers used owner-operators the decal fee was charged to the owner-operators pursuant to lease agreements and that accordingly any refunds should be paid to the owner-operators rather than to the carriers.

On September 8, 1988, in an unpublished letter opinion, the New Jersey Tax Court held that *Scheiner* should be given retroactive effect and that New Jersey should accordingly refund the $34 million collected from out-of-state truckers. No final order has yet been entered because the parties, including OOIDA, are negotiating a distribution plan under the court's supervision. Unless foreclosed by this Court's decision in the instant case, New Jersey intends to appeal.

B. Vermont's History of "Flat Fees."

"Flat fees" were first adopted in Vermont in 1925, Acts 1925, No. 70. The specific form of "flat fee" was in effect, unchallenged, from 1951, initially at $10 per year plus $3 per trip, and amended upward three times, until 1981. In 1981 ATA and two corporate truck carriers challenged the "flat fee" provision then applicable against all non-Vermont trucks when the Vermont legislature increased the annual fee from $20 to $40 per year and the trip fee from $10 to $15 (*ATA v. Conway*, 146 Vt. 574 508 A.2d 405 [1986] *cert. denied* 107 S.Ct. 9262 [1987] ["*ATA #1*"]). The trial court upheld the "flat fees," but the Vermont Supreme Court remanded with directions but without determination on the merits. (*ATA v. Conway*, 142 Vt. 17, 451 A.2d 42, [1982] ["*ATA #1A*"].)

Prior to definitive determination by the courts in *ATA #1* the legislature instituted a diesel fuel tax (23 V.S.A. §§ 3001 et seq.) and its accompanying $50 fuel user license fee ("FULF") (23 V.S.A. §§ 3007, 3010, and 415). That too was challenged shortly after passage in 1982, *ATA v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), *cert. denied* 107 S.Ct. 3262 (1987) ("*ATA #2*"). In its order the trial court rejected the *Aero Mayflower* line of cases of this Court and adopted the reasoning of the Maine Supreme Court in *ATA v. Quinn*, 437 A.2d 623 (Me., 1981), and declared the FULF unconstitutional because of the relative cost differences per mile of travel applicable to Vermont and non-Vermont trucks.

The Vermont Supreme Court, in its decisions in *ATA #1 and ATA #2* did not reach the issue decided by the trial court in *ATA #2*. Instead it held that the "flat fees" were facially discriminatory because in *ATA #1*, even though the "flat fees" were in lieu of a diesel fuel tax, they were applicable only to non-Vermont trucks,

and in *ATA #2* the "flat fee"—charged against all trucks—was a credit against the cost of Vermont registrations.[3]

Because of the late date of the Vermont Supreme Court's decisions in *ATA #1* and *ATA #2*—February 21, 1986—in relation to Vermont's legislative session, the legislature chose to replace the facially discriminatory "flat fees" by re-adopting the FULF and terminating the facial discrimination, thus making the FULF consistent with this Court's *Aero Mayflower* line of cases. Three days later ATA filed suit against five Vermont officials challenging the constitutionality of the FULF on behalf of a class of motor carriers having their base truck registrations in states other than Vermont. Simultaneously, ATA moved for an injunction or escrow of funds collected. The trial court judge who had ruled in ATA's favor in *ATA #2* was sought out in another county for the purpose of interim relief, but the case was filed in a different county; the judge ordered *ex parte* interim relief in the form of escrow.

On June 23, 1987, the Court handed down the *Scheiner* case. Twenty-five days later the Court's mandate issued in *Scheiner* pursuant to Court Rule 25. However, the Court's *Scheiner* opinion changed the "flat fee" rule, and established anew that:

1. Revenue producing—as opposed to cost recovering—"flat fees" in interstate commerce are probably discriminatory against interstate commerce.

2. The test in *Scheiner*, 107 S.Ct. at 2847, is that "flat fees" are valid "when they are the only practicable means of collecting revenues from users and the use of a more

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[3] The Vermont Supreme Court denied refunds based on the doctrine of sovereign immunity and the court denied *cert.*, 107 S.Ct. 3262 (1987), in both *ATA #1* and *ATA #2* as part of a combined petition.

finely gradated user fee schedule would pose genuine administrative burdens."

3. The Court remanded the question of refunds for a determination whether the ruling should be applied retroactively. *Id.* at 2847-2848.

On September 11, 1987, ATA filed a motion for summary judgment based on *Scheiner* and asked for refund of all fees paid. The Vermont officials countered with a cross motion for summary judgment on the issue of refunds. The Vermont officials determined that the 5-4 decision in *Scheiner* was controlling in the pending case and did not oppose injunction of the FULF. In early 1988, the superior court ordered that full refunds were to be made. The Vermont officials appealed and oral argument was held on October 13, 1987.

C. Relevance of Vermont's and New Jersey's Flat Fees to the Instant Case.

The facts surrounding Vermont's and New Jersey's "flat fees" establish:

1. The New Jersey decal fee was enacted in 1963, well before *Complete Auto* was handed down. Vermont had "flat fees" as part of its highway use fees for over sixty years. Under the Court's "flat tax" analysis as set forth in *Scheiner*, New Jersey's decal fee, e.g., at $3 in 1963 was as unconstitutional as a $25 fee in 1984.[4]

2. No one challenged New Jersey's decal fee for 20 years or Vermont's predecessor flat fee to the FULF for 30 years.

3. The increases in the New Jersey fee from $6 to $25 in 1984 and the Vermont fee from $20 to $40 in 1981 were parts of broad packages to increase funds for highway programs. Both states sought to raise revenue from both in-state vehicles (through registration fees) and from other in- and out-of-state vehicles through increases in the fuels tax and the decal fee and, in the case of Vermont through both increases in registration fees and the flat fees on out-of-state trucks.

4. The New Jersey decal fee was purely and simply a "flat fee" with no hint of facial discrimination, as was the most recent Vermont FULF.

5. As a result of the certification of a class and the sanctioning of a single class-wide refund claim, New Jersey is at risk for the full $34 million rather than a lesser amount as would be the case if its refund claim statute applied. *See N.J. Stat. Ann.* 54:39A-19 and *N.J. Stat. Ann.* 54:49-14.

6. As New Jersey's decal fee was not escrowed, the revenues have been spent.

7. a. New Jersey promptly and fully obeyed this Court's holding in *Scheiner*, conceding that the decal fee was invalid and volunteering to refund all fees collected after June 23, 1987.

b. Vermont also promptly obeyed this Court's holding in *Scheiner*, conceding that the FULF was invalid as soon as ATA sought to enforce *Scheiner* in Vermont.

8. a. The propriety of an award of refunds of "flat fees" involves numerous state law questions including, in New Jersey, the existence and effect of a statutory refund provision, namely *N.J. Stat. Ann.* 54:39A-19, the effect of a stipulation regarding the availability of a remedy, the propriety of class actions in tax cases, the propriety of a single refund claim on behalf of a class, the demonstrable lack of harm to truckers who by contract passed on the burden of the fee to owner-operators, and the economic argument that truckers generally passed on the burden of the decal fees to their customers.

[4] If the cost of issuing a decal is currently $1 in New Jersey, which ATA did not contest, it was less in 1963, and thus the fee, even at $3, plainly exceeded the cost of issuance.

b. In Vermont state law issues involve the qualifications of the three plaintiffs to bring and maintain actions in Vermont's courts, the propriety of the class action and notice of the action provided to the class, the propriety of the interim relief pursuant to law at the time it was granted, and sovereign immunity.

Any ruling by this Court as to the prospective or retroactive application of the *Scheiner* opinion should be sensitive to those and other very individualized state law issues.

Ultimately, the above facts establish that the picture painted by ATA in the instant case is highly misleading. New Jersey, e.g., did not in 1984 enact a questionable flat fee; it simply raised a fee which had gone unchallenged for 20 years. Nor did New Jersey or Vermont ignore or attempt to evade this Court's holding in *Scheiner*. Nor can it be said that the courts of New Jersey have reversed the general rule that judicial decisions have retroactive effect for a general rule of prospectivity in state tax cases. In *Exxon Corp. v. Hunt*, 109 *N.J.* 110, 534 A.2d 1 (1987), the New Jersey Supreme Court declined to hold that this Court's decision preempting the New Jersey spill compensation tax, *Exxon Corp. v. Hunt*, 475 U.S. 305 (1986), should be prospectively applied. In *Private Truck Council of America, Inc. v. State*, 221 N.J. Super. 89, 534 A.2d 13 (N.J. App. Div. 1987), aff'd o.b. 111 N.J. 214, 544 A.2d 33 (1988), the Appellate Division of the New Jersey Superior Court concluded that New Jersey's so-called retaliatory truck tax was unconstitutional and should be refunded from the date the complaint was filed. Finally, in both New Jersey's and Vermont's flat fee litigation, the trial level courts have denied the states' requests for prospective application of *Scheiner*. This is hardly consistent with a pattern of state courts routinely denying refunds of unconstitutional state taxes.

CONCLUSION

For the reasons set forth above, the rule adopted in *Scheiner* should be effective prospectively only and the Court should not use the instant case to reverse or otherwise eviscerate the *Chevron* test.

Respectfully submitted,

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No. 88-325

Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM 1988

AMERICAN TRUCKING ASSOCIATIONS,
INC., et al.,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR,
ARKANSAS HIGHWAY
AND TRANSPORTATION DEPARTMENT, et al.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF OF THE AMICI CURIAE STATES OF PENNSYLVANIA, ALASKA, COLORADO, INDIANA, MARYLAND, MINNESOTA, NEBRASKA, NEVADA, RHODE ISLAND, AND WYOMING IN SUPPORT OF RESPONDENTS

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NEBRASKA, NEVADA, RHODE ISLAND,
AND WYOMING
IN SUPPORT OF RESPONDENTS**

Pursuant to Rule 36 of the rules of this Court, the Commonwealth of Pennsylvania, by its Attorney General, and the

amici states by their Attorneys General respectfully submit this Brief as amici curiae in support of Respondents.

INTEREST OF THE AMICUS CURIAE

In Am. Trucking Ass'ns v. Scheiner, No. 86-357, slip op. (U.S. June 23, 1987), the Court held unconstitutional certain highway user fees imposed by states on motor carriers. These fees were dedicated specifically to fund transportation facilities and were invalidated for not being proportional to the services rendered by the State. This case presents the question, left open in Scheiner, of whether the rule announced in Scheiner should apply retroactively, so as to require the refund of all taxes already collected,

or should apply prospectively only.[1]

Pennsylvania and some of the amici States imposed and collected taxes that are now invalid under the rule announced in Scheiner. Other amici States join in this brief to insure a proper review of the principles involved in litigating refund issues under Chevron v. Huson, infra. Amici States with highway user

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[1]The highway user fees invalidated in Scheiner were imposed by Pennsylvania. The Court, recognizing that the retroactivity issue was a substantial one, remanded the case for consideration of that issue. Scheiner, No. 86-357, slip op. at 30, (U.S. June 23, 1987). The case is now pending in the Supreme Court of Pennsylvania, and its outcome will likely be affected by the Court's disposition of ATA's first challenge in this case.

fees face the prospect of massive liability if Scheiner is applied retroactively. Pennsylvania estimates that its liability alone will be $370 million plus interest; collectively, the other amici states imposing highway user fees estimate their liability at about $350 million plus interest.[2] Payouts of this magnitude would cripple the ability of the amici States to maintain and improve the highways and bridges on which commerce depends.

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[2]Arkansas' estimated potential liability is $160,000,000 in tax plus appropriate interest. Indiana's potential liability was $60,000,000 in tax plus interest. (Indiana settled their refunds claims with the trucking industry by entering into a stipulation applying Scheiner prospectively only, which required a refund of tax and interest in the amount of 2.6 million dollars.) Kentucky's estimated potential liability is $59,000,000 in tax

(FOOTNOTE CONTINUED ON NEXT PAGE)

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plus appropriate interest. New Jersey's estimated potential liability is $34,000,000. Vermont's potential liability is $7,900,000 in tax plus interest. Maryland's estimated potential liability was $34,000,000. Maryland's liability was settled by a final decision of the Maryland Court of Appeals, Am. Trucking Ass'ns v. Goldstein, 541 A.2d 955, 957 (1988), which applied Scheiner prospectively only.

SUMMARY OF THE ARGUMENT

Scheiner should apply prospectively only. Scheiner broke with 70 years of clear precedent, which had upheld highway user fees and which the Court had cited with apparent approval as recently as 1981. Congress, too, had recently surveyed the field of highway user fees, but had given no hint that it thought these flat taxes constitutionally infirm. In imposing such taxes, Pennsylvania and other states relied on this settled view of the law; they should not now be punished for failing to predict that it would be overturned.

Nor is retroactive application necessary in order to vindicate the Commerce Clause values that underlie

Scheiner. The Commerce Clause's purpose is to prevent interstate barriers to the free flow of commerce. Scheiner has removed those barriers for the future, and whatever commerce did not flow in the past cannot be affected now.

On the other hand, the inequities of retroactive application are patent. The taxes the states collected were dedicated to the construction, repair and maintenance of highways and bridges. The states cannot sell these improvements or give them to petitioners to satisfy their demands. Nor can the petitioners now return to the states the value they received from these improvements in the form of new bridges, shorter and better routes, and less wear and tear on their vehicles.

The petitioners have secured a substantial benefit by ridding themselves of highway user fees for the future. But every factor germane to the question counsels against giving them retroactive relief as well.

ARGUMENT

I. The Court's Decision In ATA v. Scheiner Should Be Applied Only Prospectively Because It Overruled Clear Precedent Upon Which The State Of Arkansas And Six Other States, Including Pennsylvania, Relied, Because Prospective Application Fully Serves Commerce Clause Policies, And Because It Would Be Unfair To Order Massive Refunds Where The Monies Collected Have Been Devoted To Road Improvements Of Which Motor Carriers Have Taken Advantage.

In its remand of Scheiner and Am. Trucking Ass'ns v. Gray, No. 86-358 memo. op., judg. vacated and remanded (U.S. June 26, 1987) (now Am. Trucking Ass'ns v. Smith, No. 88-325), the Court left open the question whether its ruling in Scheiner should be applied retroactively.[3] As described below, well

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[3]The case now before the Court also presents the question of whether Arkansas should be compelled to refund

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settled rules for judging whether the decision should be applied to past completed transactions mandate that the decision be given only prospective effect.

The Constitution is neutral on the question of whether court decisions should be applied prospectively or retroactively. Great Northern R.R. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358,364 (1932). On many occasions, the Court has held that a particular ruling

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(FOOTNOTE CONTINUED)

flat highway user fees that were collected after the date Scheiner was announced. The amici States take no position on this question, although it is important to note that Pennsylvania stopped collecting its two highway user fees and refunded all taxes received on or after the date Scheiner was decided, June 23, 1987.

should be applied only to events occurring after its decision. See e.g., Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 87-89, 91 (1982); Buckley v. Valeo, 424 U.S. 1, 142-143 (1976) (per curiam); Chevron Oil Co. v. Huson, 404 U.S. 97, 108-109 (1971).[4]

There is no justification for a sweeping rule of retroactive application. Prior decisions may have consequences which cannot be justly ignored. The

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[4]These cases refute petitioners' argument that, as between two litigants, the one who "guessed wrong" about the law should always bear the "burden of surprise." Br. for Pet., p. 15. If this were really so, all decisions would always apply retroactively, and there would be no need for retroactivity analysis at all. Petitioners' argument simply begs the question.

past cannot always be erased by a new judicial declaration." Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940). In each case, the Court must first determine whether the new decision was a clear break with prior precedent; if so, the decision on prospectivity is governed by an examination of the history, purpose and effect of the new rule, as well as the inequity and disruption that would be imposed by its retroactive application. Chevron Oil Co., supra, 404 U.S. at 106-107.[5]

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[5]These considerations parallel those canvassed by the courts in determining whether, and to what extent, to employ equitable remedies at their disposal. See Lemon v. Kurtzman, 411 U.S. 192, 198 - 203 (1973).

Petitioners, however, ask the Court not to apply Chevron to this case at all, but rather to adopt a per se rule that Chevron is unavailable to litigants that happen to be units of government. Br. for Pet., p. 10-12. To support this remarkable request, petitioners rely heavily on Owen v. City of Independence, 445 U.S. 622 (1980). But Owen has little relevance here.

Owen is, at bottom, a statutory construction case; it addresses the important but narrow question of whether Congress intended municipalities to enjoy any degree of immunity in actions brought under 42 U.S.C. §1983. Owen, supra, 445 U.S. at 635 ("question . . . is essentially one of statutory construction"). The decision in Owen

thus rests, not on broad principles of constitutional law or public policy, but on features of legislative and legal history that illuminate the intent of the 19th-century Congress that enacted Section 1983. Id. at 636-56. This case, on the other hand, is governed not by the intent of Congress in 1871, but by the Court's own standards, laid down in Chevron, on how best and most fairly to apply its own decisions. On this issue, Owen has little to say.

Moreover, petitioners' mechanical application of Owen to deny the benefit of Chevron to a single class of litigants--government units--ignores the important differences between Section 1983 actions and Chevron-type situations. Section 1983 itself singles

out government units; indeed, Section 1983 exists solely to provide a remedy against government units and their agents, and when Owen is applied in such an action it does no more than further the remedial purpose of the statute. Chevron, on the other hand, is a neutral principle of decision-making, which applies to all litigants alike, and whose touchstones are considerations of fairness and equity. It would be anomalous indeed to exclude a single class of litigants from the benefits of such a rule and in fact, the Court has declined to do so. The Court has, in a number of cases, applied its rulings prospectively only in order to avoid injustice or inequitable administrative and financial hardships on state and local governments. Florida v. Long, No. 86-1685, slip op. at 11 (U.S. June 22, 1988); Lemon v. Kurtzman, 411 U.S. 192,

198-199 (1973); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969). We proceed, then, to consider the proper application of Chevron to this case.

A. This Court's Decision In Scheiner, Which Invalidated Flat Fees on Motor Carriers Imposed Solely For the Use Of State Highways, Was A Clear Break With Precedent, Which Was Not Foreseeable Under The Chevron Test.

The Court's decision in Scheiner clearly established a new principle of law, which amounts to a clear break with past precedent. Despite ten prior approvals of non-mileage related highway user fees expended solely for transportation facilities,[6] the Court held in

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[6]Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950) (highway user fee based on fair market value of motor vehicles); Aero Mayflower Transit Co. v.

(FOOTNOTE CONTINUED ON NEXT PAGE)

Scheiner that " . . . precedents upholding flat taxes can no longer support the broad proposition . . . that

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(FOOTNOTE CONTINUED)

Bd. of R.R. Comm'rs, of State of Montana, 332 U.S. 495 (1947) (flat highway user fee imposed on motor carriers); Clark v. Paul Gray, Inc., 306 U.S. 583 (1939) (flat highway user fee imposed on certain motor vehicles); Dixie Ohio Express v. State Revenue Comm'n of Georgia, 306 U.S. 72 (1938) (highway user fee based on manufacturer's rated capacity); Morf v. Bingaman, 298 U.S. 407 (1936) (flat highway user fees imposed on motor vehicles); Aero Mayflower Transit Co., v. Georgia Pub. Serv. Com'n, 295 U.S. 285 (1935) (flat highway user fee imposed on motor carriers); Hicklin v. Coney, 290 U.S. 169 (1933) (highway user fee based on carrying capacity); Clark v. Poor, 274 U.S. 554 (1927) (highway user fee based on carrying capacity); Kane v. New Jersey, 242 U.S. 160 (1916) (highway user fee based on horsepower); Hendrick v. Maryland, 235 U.S. 610 (1916) (highway user fee based on horsepower).

every flat tax for the privilege of using a state's highway must be upheld." Scheiner, No. 86-357, slip op. at 28, (U.S. June 23, 1987). Scheiner's newly announced requirement that specifically dedicated highway user fees must be proportional created a potential liability of nearly $1 billion to the seven states that had imposed highway user fees as a component of their highway taxation schemes.[7]

This break with the past was not clearly foreshadowed. To the contrary, cases upholding flat highway user fees had been cited with apparent approval in five cases, decided as recently as 1981. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 621-622 (1981); Massachusetts v. United States, 435 U.S.

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[7]See Footnote 2.

444, 463-464 (1978); Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 714-716 (1972). Even Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 n.6, (1977), and Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 607 n. 4 (1951), upon which the petitioners place so much reliance, cite flat fee cases with approval.

Petitioners seek to avoid prospective-only application of Scheiner by shrouding Scheiner's new rule of proportionality for user fees in discussion of the change in the law regarding general revenue taxes brought about by Complete Auto Transit, Inc. v. Brady, supra. That the constitutional law relevant to user fees has evolved on

a track distinct from the track on which the law has evolved relevant to general revenue taxes is clearly apparent in the Court's decision in Commonwealth Edison Co. v. Montana, 453 U.S. 609, 621-622 & n. 12 (1981):

> The Montana Supreme Court held that the coal severance tax is 'imposed for the general support of the government' . ., and we have no reason to question this characterization of the Montana tax as a general revenue tax. Consequently, in reviewing appellants' contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. See, e.g., Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972); Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Ingels v. Morf, 300 U.S. 290 (1937)[12]

[12]As the Court has stated, "such imposition, although termed as tax, cannot be tested by standards which generally determine the validity of taxes." Interstate Transit, Inc. v. Lindsey, 283 U.S. 183, 190 (1931). . . . (emphasis added)

Each of the decisions cited in the foregoing passage concerned a user fee imposed on transportation. The flat tax decisions elaborated a set of applicable considerations different from those applied to general revenue taxes, reflecting the different nature of user fees.[8]

[8]Paul J. Hartman, "Chapter 12, Exactions for the Use of Public Facilities," Federal Limitations on State and Local Taxation. Lawyer's Cooperative Publishing Co., 1981, pp. 665-666.

This Court's most recent pre-Scheiner user fee decision, which post-dated Complete Auto Transit, supra, relied extensively on the earlier flat tax decisions in evaluating the validity of the fees under challenge, and did not cite a single general revenue decision as pertinent to that analysis. Massachusetts v. United States, supra, 435 U.S. at 463-467. Simply stated, not a single decision of this Court prior to Scheiner in any way undercut the vitality of the user fee decisions.

It is significant that not one member of Pennsylvania's Supreme Court foresaw the possibility that the Court would overrule over 70 years of highway user fee precedents. Perhaps this is

the reason that the majority of this Court expressed no disagreement with the statement of Justice O'Connor in dissent that "Pennsylvania . . . had every reason to rely upon the settled understanding that highway taxes reasonably related to the benefit conferred do not violate the Commerce Clause." Scheiner, No. 86-357, slip op. at 3, (U.S. June 23, 1987).

Exercising its authority under the Commerce Clause, Congress in recent years has repeatedly visited the area of state taxation of motor carriers, in order to prevent discrimination against interstate commerce. In the Motor Carrier Act of 1980, Congress outlawed a particular form of state taxation, which

it determined unreasonably burdened interstate commerce.[9] The Act prohibited certain state taxes on motor carrier property, but left intact other forms of state taxation, including highway user fees on motor carriers.[10] Indeed, the legislative history of the Act makes clear that Congress consciously determined not to place any restrictions at that time on state highway user fees.[11] In 1984, Congress increased the federal flat weight-based user fee charges on trucks,[12] citing problems

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[9] See 49 U.S.C. §11503a

[10] See 49 U.S.C. §10521(b)(4)

[11] H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. (1980)

[12] 26 U.S.C. §4481(a)

and expenses relating to feasibility and administrative costs of alternative taxing schemes,[13] which were much the same problems that motivated the states to adopt similar fees. Congress also has conducted numerous hearings in recent years on the issue of state taxation of motor carriers,[14] none of which has resulted in the outlawing of states' highway user fees.

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[13]Report to Congress: Alternatives to Tax the Use of Heavy Trucks, V-3 (1984) by the U.S. Department of Transportation, Federal Highway Administration

[14]Oversight of the Motor Carrier Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation, 98th Cong., 1st Sess. (1983); Surface Transportation Issues: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation, 94th Cong., 2d Sess (1984).

In their effort to characterize the new rule announced in Scheiner as foreseeable, petitioners "suggest that Aero Mayflower stood alone in 1983 as authority in support of the constitutionality of flat user fees. Br. for Pet., p. 21. Petitioners' suggestion, of course, conveniently ignores nine other binding flat fee precedents,[15] three additional explicit approvals of prevailing flat fee analysis,[16] and at least two other tacit approvals of flat fees.[17] In

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[15]See Footnote 6

[16]Commonwealth Edison Co. v. Montana, supra, 453 U.S. at 621-622 & n. 12; Massachusetts v. United States, supra, 435 U.S. at 463-469; Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., supra, 405 U.S. at 714-716.

[17]Complete Auto Transit, Inc. v. Brady, supra, 430 U.S. at 278 n. 6; Spector Motor Service, Inc. v. O'Connor, supra, 340 U.S. at 607 n. 4

light of Congress' refusal, after review, to prohibit highway user fees,[18] state legislatures were clearly justified in relying upon the extensive body of Commerce Clause precedent supporting the constitutionality of such fees, and could not possibly be expected to have foreseen their invalidation in Scheiner.

For all these reasons, the decision in Scheiner was a clear break with past precedent, which was not foreseeable and which thus requires a further examination of the criteria prescribed in Chevron to determine whether retroactive application of Scheiner is required.

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[18]See Footnote 10

B. Prospective Application of Scheiner Will Further Commerce Clause Policies.

The Court noted in Scheiner that the basic purpose of the Commerce Clause is to prohibit the multiplication of preferential trade areas destructive of free commerce anticipated by the Constitution. Scheiner, No. 86-357, slip op. at 13, 14, (U.S. June 23, 1987). This purpose, which was held to be offended by non-mileage related highway user fees, can be effectuated fully by prospective application of the Scheiner decision in this case. Flat fees now have been eliminated, and barriers to free trade have been removed. There is no longer a danger that free trade will be hindered by the adoption of flat fees by each of the fifty states. Commerce now may flow

unimpeded by these improper disincentives to travel through states like Pennsylvania and Arkansas, which had imposed highway user fees as part of their overall highway taxation schemes. A refund, on the other hand, would do nothing to further advance these purposes.[19]

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[19]Petitioners' claim that prospective application of Scheiner will cause irreparable injury to the trucking industry while undermining the purpose of the Commerce Clause, (Br. for Pet., p. 24-29) is quite inconsistent with petitioners' selective pursuit of retroactive relief in the states that employ flat fees. Although petitioners are actively asserting retroactive application of Scheiner in Arkansas, Pennsylvania, Kentucky, New Jersey, and Vermont, similar claims by petitioners were withdrawn by stipulation in Indiana and abandoned at the trial court level in Maryland. See Footnote 2.

This is not to say that governments are free with impunity to levy obviously illegal taxes knowing that, at worst, they will be told to stop, but not to return the revenue. Petitioners' invocation of the spectre of States enacting one such tax after another, Br. for Pet. p. 26-28, ignores the Court's repeated observation that state legislators swear an oath to support the Constitution, U.S. Const., Art. VI, §3; see, e.g., Rostker v. Goldberg, 453 U.S. 57, 64 (1981), and ignores the Court's consequent "reluctance to attribute unconstitutional motives to the States." Mueller v. Allen, 463 U.S. 388, 394 (1983). Even more important, petitioners' argument ignores the fact that such efforts by the States would be unavailing in any event. The non-retroactivity doctrine of Chevron comes

into play only when, as a threshold matter, there has been a clear break with past precedent. A series of illegal taxes, which differed from each other only marginally would by definition not be eligible for non-retroactive treatment.[20]

C. Retroactive Application of the New Rule of Law Announced In Scheiner Would Produce Substantial Inequitable Results.

Retroactive application of the new rule announced in Scheiner would produce "substantial inequitable results." Cipriano v. City of Houma, 395 U.S. 701,

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[20]There is also little chance that a ruling in favor of prospectivity here will discourage Commerce Clause challenges in the future. Commercial enterprises such as those of petitioners have a substantial incentive to litigate these questions (even for only a prospective victory), and the circumstances here are significantly extraordinary to make it unlikely that others will be dissuaded from filing suit.

706 (1969) (per curiam). The states of Arkansas and Pennsylvania, along with five other states, justifiably relied on at least fifteen precedents in this Court in deciding to employ specifically dedicated highway user fees as a component of their highway taxation schemes. The revenues that were raised were dedicated specifically to the repair and maintenance of bridges and highways upon which the motor carriers traveled; and the funds collected have already been devoted to such repair and reconstruction of hundreds of deteriorated bridges and highways.

The affected states cannot turn back the clock on these projects and simply return the money previously collected. The funds have paid for repair and replacement of deteriorating transportation facilities that had been damaged

in part by the increasingly heavy interstate motor vehicles upon which the fees were imposed. The benefits to these carriers are clear and substantial since replacement and repair of roads and bridges provided them with safer and less time-consuming routes.

At the time these user fees were imposed, binding precedent held that fees specifically dedicated for construction of transportation facilities were constitutional as long as they were facially nondiscriminatory and not excessive when compared to the benefit conferred by the taxing state.[21] Until

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[21] See Clark v. Paul Gray, Inc., supra, 306 U.S. at 599, Commonwealth Edison Co. v. Montana, supra, 453 U.S. at 621-622 & n. 12; and Paul J. Hartman "Chapter 12, Exactions for the Use of Public Facilities", Federal Limitations on State and Local Taxation. Lawyers Cooperative Publishing Co., 1981, p. 665-666.

the Scheiner decision, no one, including not a single member of the Pennsylvania Supreme Court, had reason to believe otherwise.

Equity does not direct that the petitioners be afforded a refund. A prospective application of the new rule announced in Scheiner does not leave the truckers with a hollow victory. They retain the substantial advantage of having secured a ruling that bars future collection of these, or any other, non-mileage related highway user fees, despite Congress' refusal to bar such fees. They also have enjoyed, and will continue to enjoy for many years to come, the substantial improvement of highways and bridges in Pennsylvania, Arkansas, and other states, which have been realized only in part by fees charged on the trucking industry.

The refund that petitioners seek would have the grossly unfair effect of allowing them to enjoy these benefits without having contributed anything toward their cost. Petitioners imply that refunds are appropriate because they pay other taxes. Br. for Pet., p. 9. Such reasoning, however, would allow the trucking industry to avoid contributing any additional taxes towards the replacement of bridges and highways necessitated particularly by the heavy loads carried by interstate motor carriers.[22] Meanwhile, refunds on the

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[22]Granting refunds in these circumstances is particularly inappropriate given the fact that had the States foreseen the new principle in Scheiner, they could have imposed a more

(FOOTNOTE CONTINUED ON NEXT PAGE)

order of $160,000,000 and $370,000,000 respectively would severely impair Arkansas' and Pennsylvania's future highway and bridge programs.

(FOOTNOTE CONTINUED)

finely calibrated third structure tax (for example, a weight distance tax), which would meet the proportionality requirement of Scheiner and which would have recompensed the States for the additional highway costs necessitated by heavy interstate motor vehicles.

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Arkansas should be affirmed insofar as it refuses to apply Scheiner retroactively.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-325

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC. ET AL.
PETITIONERS

V.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL.,
RESPONDENTS

On Writ of Certiorari to
the Supreme Court of Arkansas

BRIEF OF THE TRANSPORTATION CABINET OF THE COMMONWEALTH OF KENTUCKY AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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BRIEF OF THE TRANSPORTATION CABINET OF THE COMMONWEALTH OF KENTUCKY AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

Pursuant to Rule 36 of this Court, The Transportation Cabinet of the Commonwealth of Kentucky by its undersigned respectfully submits this Brief as amicus curiae in support of the Respondents.

INTEREST OF THE AMICUS

In 1986 the Kentucky General Assembly finding the fiscal condition of the Commonwealth's dedicated road fund to be in need of additional revenues enacted a new Supplemental Highway Use Tax (SHU Tax). The purpose of this third structure tax was to raise additional road fund revenues in such a way that would fairly allocate the maintenance and construction costs for roads and bridges among the various classes of highway users.[1] Kentucky's SHU Tax replaced a prior weight distance tax which had been in effect since 1982.

The SHU Tax was a third structure tax required to be paid by all vehicles 60,000 pounds or over as an annual fee predicated upon a vehicle's projected mileage operations within the Commonwealth for the period of February 1 to January 31 of each year. The tax provided for five mileage gradations as follows:

less than 10,000 miles	$150
10,000 to 19,999 miles	160
20,000 to 29,999 miles	170
30,000 to 39,000 miles	180
over 40,000 miles	200

The differences between Kentucky's SHU Tax and Pennsylvania's axle tax struck down in American Trucking Association, Inc. v. Scheiner, ____ U.S. ____ ,107 S. Ct. 2827, 97 L.Ed2 226, (1987) and that of the Arkansas HUE tax stuck down in American Trucking Association, Inc. v. Gray, 746 SW2 377 (1988) cert. granted , 109 S.Ct. 389 (1988), have not been significant enough to

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1 The 1982 Kentucky Weight Distance Tax was anticipated to produce in excess of $32 million for FY 86-87. The statute required that a motor carrier pay 2.85¢ per mile for all miles operated in the Commonwealth. In 1986, Kentucky enacted the SHU Tax which was anticipated to raise $59 Million. When the Kentucky Supreme Court has struck down the SHU Tax, Kentucky has enacted as of April 1, 1988 a 4¢ per mile weight distance tax.

save it from the principles espoused in Scheiner. As a result, on January 21, 1988, the Kentucky Supreme Court, Kentucky's highest state court, struck down Kentucky's SHU Tax having determined it to be a flat tax as defined in Scheiner. (See Commonwealth of Kentucky v. American Trucking Association, Inc., 746 SW2 65 (1988).

As a result of this Court's monumental decision in Scheiner, and the Kentucky Supreme Court in Commonwealth v. ATA, the Transportation Cabinet is now faced with the possibility of having to refund some $59 million dollars in revenue, or 16.2% of its non-restricted dedicated annual road fund budget. One of the central issues in the Kentucky case involves one of the same issues now pending before this court; specifically, whether this court's decision in Scheiner should be applied prospectively if the elements of Chevron Oil Company v. Huson, 404 U.S. 97 (1971), are met.

SUMMARY OF ARGUMENT

When this Court issued its monumental decision in Scheiner in 1987 it expressly remanded back to the states the issue of whether refunds should be given. See Scheiner, 97 L.Ed2 at page 252. Since then, each of the states affected by the Scheiner decision has been analyzing that decision in light of this Court's standard in Chevron to determine whether Scheiner should be applied prospectively.

The only state supreme court to have made such a decision concerning prospective application to date is the Arkansas Supreme Court. Based upon the Arkansas Court's decision that the facts merit prospective application of the Scheiner decision, this Court granted review.

The Commonwealth of Kentucky, like Arkansas, enacted a "flat" tax which was ultimately struck down by the Kentucky Supreme Court based upon this Court's decision in Scheiner. As a result, Kentucky is now faced with the issue of

refunds of $59 million collected before the Kentucky Supreme Court declared Kentucky's statute unconstitutional.

Kentucky is now litigating the issue of refunds. Like the state of Arkansas, Kentucky contends that the three-prong test of Chevron has been met and that Scheiner should be applied prospectively.

However, any decision which this Court issues concerning the standard espoused in Chevron will directly affect the Commonwealth of Kentucky. Therefore, Kentucky urges this court to retain the Chevron standard.

ARGUMENT

I. THE THREE-PART TEST OF CHEVRON HAS BEEN MET REQUIRING THAT SCHEINER BE APPLIED PROSPECTIVELY.

In 1971 the Supreme Court in Chevron Oil Company v. Huson, 404 US 97 (1971), set forth the necessary factors to be considered in deciding whether a decision should be given prospective application. The court stated:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . . or by deciding an issue of first impression whose resolution was not clearly fore-shadowed, ... Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.". . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce

> substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity".
> Chevron, 404 U.S. at 106-07

As the facts set forth herein will indicate the Court's decision in American Trucking Association v.Scheiner, _____ U.S. _____, 107 S. Ct. 2827, 97 L.Ed2 226 (1981), is a case that is clearly subject to prospective application having met the test of Chevron.

A. Scheiner Established a New Principle of Law.

In reliance upon Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950), and its progeny seven states including Pennsylvania, Arkansas and Kentucky enacted some variation of a "flat tax". Capitol Greyhound Lines, 339 U.S. at page 545, specifically held that a "flat" tax was valid unless the amount was shown to be in excess of fair compensation for the privilege of using state roads. The most recent Supreme Court approval of this principle was announced in Massachusetts v.

United States, 435 U.S. 444 (1978), and Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972).

However, in Scheiner, handed down in 1987, this court overruled Capitol Greyhound Lines. The Court stated in the majority opinion in Scheiner :

> "Thus, the precedents upholding flat taxes can no longer support the broad proposition, advanced by appellees, that every flat tax for the privilege of using a State's highways must be upheld even if it has a clearly discriminatory effect on commerce by reason of that commerce's interstate character."
> Scheiner , 97 L.Ed2 at page 251

Thus, the Supreme Court precedent upon which Arkansas and Kentucky relied when enacting their tax schemes was valid prior to the issuance of Scheiner but not after its holding was issued. Such a holding makes it clear that Scheiner overruled Capitol Greyhound Lines.

Justice O'Connor was even more explicit in her dissent to Scheiner in stating

that Scheiner was in fact a new law which expressly overruled Capitol Greyhound Lines, when she stated:

> "In finding Pennsylvania's "flat" highway use taxes unconstitutional under the Commerce Clause, the Court today directly overrules the holdings of at least three cases; Capitol Greyhound Lines v. Brice, 339 US 542, 94 L Ed 1053, 70 S Ct. 806, 17 ALR2d 407 (1950); Aero Mayflower Transit Co. v. Board of Railroad Comm'rs, 332 U.S. 495, 92 L Ed 99, 68 S. Ct 167 (1947); and Aero Mayflower Transit Co. v. Georgia Public Service Comm'n, 295 U.S. 285, 79 L Ed 1439, 55 S. Ct 709 (1935)." Scheiner97 L.Ed2 at page 252.

There can be little or no question that Scheiner set forth a new standard regarding what constitutes a legal tax, one which requires states to implement taxes in directions other than those upheld in Capitol Greyhound Lines.

However, even if this Court were not to view Scheiner as overruling past precedent on which Arkansas and Kentucky relied, it is clear that it raised an issue of first impression whose resolution was not clearly foreshadowed by prior court precedent. The Commonwealth of Kentucky had

in place since 1982 a weight distance tax, of the type endorsed by Scheiner, 97 L.Ed2 at page 251. However, in reviewing this Court's prior decisions in Capitol Greyhound, Aero Mayflower, Evansville and Massachusetts Kentucky substituted a "flat tax" in place of the weight distance tax. If the Kentucky General Assembly had any suspicion whatsoever that this court would strike down an entire line of case precedent, Kentucky would never have changed its tax structure but would have simply raised the cost per mile on its weight distance which the Kentucky General Assembly did in 1988 when it re-enacted its weight distance tax. The Scheiner decision itself was issued on a 5-4 vote of the Supreme Court. As such it appears that the Court itself was closely divided in its analysis of a flat tax and whether or not all flat taxes are violative of the Commerce Clause.

Given these facts, it appears that the first of the three part test under Chevron has been met.

B. To Require Refunds in This Case Will Not Further the Purpose of The Commerce Clause .

The second test imposed by Chevron requires that the Courts consider the prior history of the rule in question (in this case the Commerce Clause), its purpose and effect, and then determine whether retrospective application will advance or hinder that operation.

This Court stated in Scheiner, 97 L.Ed2 at page 241, that the purpose of the Commerce Clause of the Federal Constitution (Art 1 §8 cl 3) is to promote freedom of trade in and among the states. See also Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1944).

The Petitioners have suggested that to require those states which relied upon clear prior case precedent to disgorge the "unconstitutional" tax would remedy any injury they may have suffered, and would deter any further violations. However, the Petitioners have not alleged nor even suggested that the flat taxes caused any carrier to cease operation or endure great financial

hardship. Further, such an argument totally ignores that the Petitioners as well as the traveling public have obtained the benefits of the tax collected by use of the highways. In fact, by virtue of their excess weight, the Petitioners have received an even greater benefit since they cause more damage to the highways than a single automobile.

While this Court has determined that flat taxes of the Scheiner variety did not fairly allocate the tax burden between intra and inter-state carriers, it is difficult to see how a windfall tax refund to carriers who have operated in and through Arkansas and Kentucky will advance the goal of the Commerce Clause to establish an area of trade free from state interference. Whatever disadvantage may have been suffered is a thing of the past and refunds cannot redress that problem.

C. The Equities Favor Prospective Application

The third factor to be considered in applying Chevron, requires the balancing of equities. Courts must balance the possibility that a retroactive application of the new law will produce substantial inequitable results against the need to right a wrong which has been done. The consideration for a retroactive application of Scheiner requires the balancing of a requirement that each of the states which enacted a "flat" tax disgorge the proceeds resulting in disrupted budgets, voided contracts for road and bridge maintenance and construction, as well as the need to recover money already spent on the highway system for the benefit of the traveling public at large against the remote possibility that refunds will provide a remedy for an injury.

The individual states bear the responsibility through their elected officials to enact and collect taxes for the benefit of the public, all the public, not just motor carriers. The responsibility for enacting laws for the

purpose of taxation while never a popular one, must be dealt with by each state legislature.

The state legislatures have justifiably relied upon past Supreme Court precedent in order to develop a tax structure which included a "flat" tax. Each state felt comfortable that its statute would pass the test of judicial scrutiny. Based upon that good faith reliance Arkansas collected in excess of $130 million, Pennsylvania collected in excess of $300 million, while Kentucky for the single year of its SHU Tax collected $59 million.

When this Court handed down Scheiner, the issue of refunds and current existing state budgets predicated upon already collected, expended, or anticipated revenues became a critical problem to each of those states where a flat tax had been enacted.

Kentucky's legislature meets on the biennium which means that Kentucky road funds are allocated in a two year budget. (See Kentucky Constitution §36.) In the Commonwealth of Kentucky alone, the refund of some $59 million or more than

16% of the annual non-restricted dedicated road funds will result in a disrupted budget for years to come. The simple facts will reveal that Kentucky has issued contracts, begun construction, initiated repairs, and encumbered by appropriation all of the $59 million it collected. These funds were not merely spent for the benefit of motor carriers but were expended for the benefit of all the traveling public, not just Kentucky residents.

A review of the facts in this case demonstrates that members of the private sector as well as the public at large have relied upon the appropriated budgets of each state. The Petitioners have suggested that paying back the tax would set right any competitive edge which Arkansas carriers may have enjoyed. However, as was pointed out, whatever harm may have been done to the Petitioner has already occurred, and a refund is not a remedy. The remedy was in removing the tax itself. As this court noted in Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon II)

reliance on state budgets weighs heavily in shaping an equitable remedy.

> "Offsetting the remote possibility of constitutional harm from allowing the State to keep its bargain are the expenses incurred by the schools in reliance on the state statute inviting the contracts made and authorizing reimbursement for past services performed by the schools. It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy." Lemon II, 411 U.S. at page 203

It is clear that there was never an intent on the part of the states that the Petitioner should be given a tax free year. It is well settled law that interstate commerce can be made to pay its way. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

Particularly in the case of Kentucky if the Kentucky General Assembly had suspected that the SHU Tax would be declared unconstitutional, Kentucky would just as easily have increased its current weight distance tax to raise the additional

revenues needed. In fact, since the removal of flat taxes nearly all the states have embarked upon different well accepted methods of taxation.[2]

The balancing of the equities clearly falls heavily upon the side of the public who benefited from the use of the tax proceeds. A refund can only injure innocent parties who have executed contracts with the various states and have already begun performance, as well as the public who will suffer when the public highways cannot be repaired.

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[2] Of those states affected Kentucky reenacted its weight distance and raised it to 4¢/mile, increased registration fees and raised its fuel taxes. Arkansas enacted a weight distance tax, Pennsylvania raised registration fees and fuel taxes, Vermont raised its fuel taxes, Maryland raised its registration fees and its fuel tax, and Indiana raised its registration fees and its fuel taxes.

II. THE STANDARD OF REVIEW IN CHEVRON CONTINUES TO BE THE MOST FAIR AND EQUITABLE METHOD FOR DETERMINING WHETHER A NEW LAW SHOULD BE APPLIED PROSPECTIVELY

When this Court announced the standard of review in Chevron in 1971 it established clear guidelines for dealing with the prospective application question. Chevron has withstood the test of time, but more importantly it has allowed for a fair and equitable application of new law. The purpose and intent behind the prospective application rule of Chevron is to provide for the least amount of damage to all parties when applying new case law.

If the requirements of Chevron are to be altered or changed, Kentucky is urging this court to consider the people who will be affected. It is all too easy at times to view a state in much the same category as one views a corporation. If a corporation is required to return money improperly collected it is anticipated

that such payments will be paid from corporate profits. However, when applying such principles to states the issues are somewhat different. When a state is required to refund monies collected there are no "profits" from which to extract such payments. Such refunds come from monies already allocated or as in this case already budgeted and expended. The Commonwealth of Kentucky as any other state holds in trust public funds, and as the trustee of such funds rightfully owes a duty to the public to account for their expenditure. The balancing of all the factors espoused in Chevron, reliance on past precedent, whether refunds can remedy a past wrong, and the balancing of equities--all weigh in favor of prospective application of Scheiner. Because of the enormous impact that a retrospective application of Scheiner will have upon the public, any consideration given by this court to change the standard of Chevron should be weighted in favor of the public who is entitled to the proper use of those funds.

As this Court correctly recognized in Scheiner the specific application of the Chevron standard is one which is best left to the individual states:

> "Appellees request that in the event of an adverse decision, the Court remand the case to the Pennsylvania Supreme Court to consider whether our ruling should be applied retroactively and to decide other remedial issues. We agree that having decided the constitutional issue presented to us, we should remand for further proceedings in the marker fee, axle tax, and marker fee refund suits. Scheiner 97 L.Ed2 at page 252, See also Tyler Pipe Industries v. Department of Revenue, _____ U.S. _____ , 97 L Ed2 199 (1987) at p. 217.

If the state courts are inconsistently or improperly applying the Chevron standard, such matters can be readily addressed by this Court. However, the guidelines of this Court are fair and equitable and set forth a standard which recognizes and balances the needs of all parties concerned.

CONCLUSION

Given the foregoing law, Chevron continues to be a fair and equitable standard in deciding prospective application of new laws. There is no reason to disturb that ruling. The facts surrounding Scheiner clearly demonstrate that is is appropriate for the state courts to prospectively apply it.

Respectively submitted,

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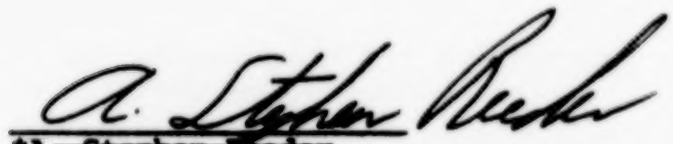

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No. 88-192 and No. 88-325

FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

MCKESSON CORPORATION,
Petitioner,

VS.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Petitioner,

VS.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, IDAHO, MONTANA, NORTH DAKOTA, TEXAS AND UTAH IN SUPPORT OF RESPONDENTS

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AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, IDAHO, MONTANA, NORTH DAKOTA, TEXAS AND UTAH IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The State of California on behalf of the California Franchise Tax Board submits this brief pursuant to Rule 36 as amicus curiae in support of respondents the State of Florida and the State of Arkansas. Rule 36.4 provides that California is not required to obtain the consent of the parties to file an amicus curiae brief.

The following States join California in this brief: Idaho, Montana, North Dakota, Texas and Utah.

While the State of California recognizes the importance of these cases to Florida and Arkansas, the concern of amicus curiae California reaches far beyond the resolution of *McKesson* and *American Trucking Associations*. Both cases present the Court with the opportunity to speak directly to the larger issue of under what circumstances must a state that enacts a tax that is subsequently determined to be unconstitutional be required to refund the taxes collected. Resolution of this larger issue will, of necessity, require the Court to decide upon and articulate the standard by which it will be determined whether a decision striking down a state tax as unconstitutional will be applied prospectively or retroactively. Of the two cases, this issue is most clearly presented in *American Trucking Associations* where the Court must decide whether to apply its decision in *American Trucking Associations, Inc. v. Scheiner*, 107 S.Ct. 2829 (1987), prospectively only.

SUMMARY OF ARGUMENT

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), this Court established a three-pronged test for governing consideration of whether to impose a civil decision prospectively or retroactively. Statements in the briefs of amicus curiae for petitioners, notably the Committee On State Taxation (COST) and the Tax Executives Institute, Inc., (TEI) urge the Court to abandon the test established in *Chevron*. Instead, the Court is urged by COST and TEI to adopt new standards with respect to state tax statutes found to violate the Commerce Clause; specifically, those briefs urge the application of standards for criminal cases set forth in *Griffith v. Kentucky*, 479 U.S. 314 (1987).

Amicus California believes the *Chevron* standard is still valid and should be applied in these cases, as well as in all cases where state tax statutes are found to be unconstitutional. Amicus California respectfully urges the Court to seize upon this opportunity to reaffirm the validity of *Chevron*, and to elaborate upon the application of the *Chevron* standard to civil cases such as these which involve state taxes found to be unconstitutional. Amicus

California also urges the Court to find that the first prong of the *Chevron* test is not a "threshold" or indispensable prerequisite to a finding of prospectivity, and to find that *Chevron* requires a balancing of all three prongs. Amicus California also urges that special recognition be given under *Chevron* to the role of taxes as the "life-blood" of the states.

ARGUMENT

THE *CHEVRON* STANDARD CONTROLS THESE CASES

No absolute rule of retroactivity prevails in the area of constitutional adjudication. *Linkletter v. Walker*, 381 U.S. 618, 628-629 (1965). Indeed, the Constitution neither prohibits nor requires retroactive effect. *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). No "bright-line" rules have been articulated by the Court under which the retroactivity decision is made. However, in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), this Court set forth three general factors when dealing with the nonretroactivity question outside the criminal area:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [citations omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citations omitted]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [citation omitted.] Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'" [Citation omitted.] 404 U.S. at 106-107.

A. *Chevron* Should Not Be Abandoned In Favor Of The *Griffith* Standard For Retroactivity In Civil Tax Cases

The Court in *Chevron* held that a decision specifying the applicable state statute of limitations in another context should not be applied retroactively because the decision overruled clear Circuit precedent on which the complaining party was entitled to rely, because the new limitations period had been occasioned by a change in the substantive law the purpose of which could not be served by retroactivity, and because retroactive application would be inequitable. 404 U.S. at 107-109. *Chevron* did not directly address the question of when retroactive effect should be given to a ruling of unconstitutionality. Amici TEI and COST openly advocate a course which would have this Court abandon the *Chevron* test in favor of a new standard with respect to state tax statutes found to be unconstitutional. The new standard proposed by TEI and COST is the one set forth in *Griffith v. Kentucky*, 479 U.S. 314 (1987). There the Court held a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 479 U.S. at 328.

Amicus California urges that the *Chevron* standard should not be abandoned and specifically should be applied to civil tax cases which present constitutional issues. There is not the slightest hint in *Griffith* that the Court's newly enunciated standard for criminal cases applies to *civil* cases. Indeed, the *Griffith* opinion states in no uncertain terms that the area of civil retroactivity "continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*." 479 U.S. at 322, n. 8. Moreover, *Griffith* relied heavily upon *United States v. Johnson*, 457 U.S. 537 (1982), in formulating this new standard of retroactivity in criminal cases. The *Johnson* opinion also affirmed the continued vitality of the *Chevron* standard for civil cases by pointing out that "all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil Co. v. Huson*." 457 U.S. at 563.

Accordingly, the Court could not have been more clear in expressing in *Griffith* and *Johnson* its intention that a new standard was being created for criminal, but *not civil*, cases on the

issue of retroactive application. Nonetheless, while amicus TEI concedes that cases addressing the validity of discriminatory state tax statutes "do not involve considerations of the same magnitude as those presented in criminal procedures cases", it argues such cases "do implicate a constitutional right." Amicus TEI argues the presence of this constitutional right distinguishes these cases from the statute of limitations issue presented in *Chevron*. TEI Brief at 20. But TEI looks to a distinction without legal significance. Whether a constitutional right is in issue is *not* the focus of the retroactivity analysis. The issue, as it consistently has been addressed by the Court, is whether the issue involves a civil as opposed to a criminal case. *McKesson* and *American Trucking Associations* are indisputably civil cases. The fact these civil cases relate to constitutional issues is only one of a myriad of factors which the Court should examine and evaluate under the expansive parameters of the three factors discussed in *Chevron*.

Amicus COST argues the rationale of *Griffith* for abandoning the prospectivity doctrine in non-final criminal cases is as compelling in civil tax cases because "just as in criminal cases where substantial conceptual difficulties arose by not applying new rules retroactively, application of the prospectivity standards of *Chevron* has generated incompatible, unworkable rules and inconsistent principles which are often ignored at lower levels." COST Brief at 14. Exactly what these "incompatible, unworkable rules and inconsistent principles" are which COST claims warrant abandonment of the *Chevron* standard is not discussed by COST. Nor is it clear whether or why these problems exist only in the civil tax cases as opposed to all civil cases. COST apparently would have this Court categorically reject *Chevron* in all state tax cases, and perhaps even in all civil cases, as an expedient means of resolving what quite possibly are "problems" which exist only in COST's imagination.

The fact the Court has never before taken the opportunity to apply the *Chevron* factors to a civil tax case involving a violation of the Constitution has left some issues unresolved with respect to how those factors are to be applied. But clear guidance from the Court in these cases can resolve those open issues without taking

the draconian step of replacing the civil *Chevron* standard with the criminal *Griffith* standard.

B. The First *Chevron* Factor, That Of Whether A New Principle Of Law Is Established, Is Not A Threshold For Prospective Application

Under the first factor of *Chevron*, the decision to be applied nonretroactively should "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [citation omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed. [citation omitted]." 404 U.S. at 106. Petitioners argue this first prong of *Chevron* is a threshold requirement for prospective application. McKesson Brief at 32, ATA Brief at 7. Amicus California disagrees, and urges the Court to interpret and clarify the *Chevron* test so as to require an examination and balancing of all three factors.

The Court has never held that the first factor of *Chevron* is a threshold requirement for prospectivity. In both *Chevron* and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982), the Court found all three *Chevron* factors militated against retroactivity, and thus did not specifically address the issue of what weight is to be given to any particular factor.[1] Amicus California urges the Court to adopt the view expressed by several Circuits that no single factor, including the

[1] Justice Stewart, author of the *Chevron* opinion, did state the issue of retroactivity "is not even presented unless the decision in question marks a sharp break in the web of the law" and "the issue is presented only when the decision overrules clear past precedent". *Milton v. Wainwright*, 407 U.S. 371, 381 n. 2 (1972) (Stewart, J., dissenting). However, *Milton* was a criminal (not civil) case, the majority did not address the retroactivity issue, and Justice Stewart did not even cite to *Chevron* in his dissent. Also, in *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982), Justice Blackmun stated in a footnote that in the civil context, the "clear break" principle has usually been stated as the threshold test for determining whether or not a decision should be applied nonretroactively. However, once again, the statement was made in the context of a criminal (not civil) case.

first prong of *Chevron*, is determinative on the retroactivity question. That view was succinctly summarized by the Tenth Circuit in *Jones v. Consolidated Freightways Corp.* (10th Cir. 1985), where the court explained the application of the *Chevron* standard as follows:

> "A proper assessment under *Chevron Oil* focuses upon the relative significance of the individual *Chevron* factors. It is not necessary that each factor compel prospective application. [Citations omitted]. While non-retroactivity generally depends upon the existence of past precedent, [citation omitted] 'the final determination involves pulling together the three factors for a careful balancing.' [Citation omitted.]" 776 F.2d at 1460, 1461.

Jones is consistent with the language of *Chevron* where the Court specifically stated that in cases dealing with the nonretroactivity question, it has "generally *considered three* separate factors", and concluded that "upon *consideration of each* of these factors" that prospective application was proper. *Chevron*, 404 U.S. at 106-107, emphasis added. Petitioners would interpret this language to mean that only where the first prong is satisfied would an examination under the second and third factors take place. Such an interpretation, however, is in direct conflict with the plain language of *Chevron* which speaks of considering not one, *but three*, factors. To interpret *Chevron* as petitioners do would nullify the need for a three-factor test and would relegate the important considerations of purpose and inequity, the second and third *Chevron* factors, to second class status, to be examined only if and when the Court has found under the first prong of *Chevron* that a new principle of law has been established.

Amicus California urges the Court not only to reject the "threshold" approach suggested by petitioners, but also to recognize that after considering and balancing all three factors, *non*retroactivity may be supported by a finding under *only one* of the three *Chevron* factors. Such an approach was followed by the First Circuit in *Fernandez v. Chardon*, 681 F.2d 42 (1st Cir. 1982), affirmed on other grounds, 462 U.S. 650 (1983), where the court found neither the first nor the second *Chevron* factors required nonretroactive application of the decision in issue. The

court in *Fernandez* then stated "[w]e might *still* find retroactivity barred if it would produce substantially inequitable results, the third *Chevron Oil* factor." 681 F.2d at 52 (emphasis added). Similarly, the Tenth Circuit in *Jones v. Consolidated Freightways Corp., supra*, 776 F.2d at 1460 remarked, "[a] proper assessment under *Chevron Oil* focuses upon the relative significance of the individual *Chevron* factors. It is not necessary that each factor compel prospective application."[2] The Eleventh Circuit reached the same conclusion in *Ackinclose v. Palm Beach County, Fla.*, 845 F.2d 931, (11th Cir. 1988), where the court stated, at page 935, "[i]n the final component of the *Chevron* analysis we are instructed that if retroactive application of a decision of the Court would produce substantial inequitable results, a holding of non-retroactivity is implied."[3] This approach followed by the First

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[2] Citing to *Mitchell v. City of Sapulpa*, 857 F.2d 713, 716 (10th Cir. 1988), petitioner McKesson states the Tenth Circuit is one of the federal Circuits which has "expressly viewed *Chevron's* first prong as a threshold test that must be met before the presumption of retroactivity can be overcome." McKesson Brief at 34, n.9. Amicus California disagrees with this statement. Page 716 of *Mitchell*, which is cited to by petitioner, discusses the applicability of the *Johnson* standard for retroactivity in criminal cases. The court at page 717 of *Mitchell* then concludes the *Chevron* (not *Johnson*) standard is to be applied, and goes on to examine each of the three *Chevron* factors. Nowhere in *Mitchell* does the Tenth Circuit state that the first prong of *Chevron* is a threshold test, and such a reading of *Mitchell* is inconsistent with *Jones*. While the Tenth Circuit in *Jones* did comment that nonretroactivity "generally" depends upon the existence of clear past precedent, *Jones* explicitly states the final determination involves "pulling together the three factors for a careful balancing," and explicitly states that it is not necessary for each factor to compel prospective application. 776 F.2d at 1460-1461.

[3] Citing to *Acoff v. Abston*, 762 F.2d 1543, 1548, n.6 (11th Cir. 1985) Petitioner McKesson stated the Eleventh Circuit is one of the federal Circuits which has "expressly viewed *Chevron's* first prong as a threshold test that must be met before the presumption of retroactivity can be overcome." McKesson Brief at 34, n.9. Amicus California disputes this statement. The footnote reference in *Acoff* clearly states the court is applying the *Johnson*, not *Chevron* standard, so any reference in *Acoff* to how the *Chevron* standard should be applied is dicta. That dicta is clearly inconsistent with the subsequent opinion of the Eleventh Circuit in *Ackinclose* which states that all three *Chevron* factors are relevant, and that it is "implied" from *Chevron* that a holding of non-retroactivity can be based solely upon a finding under the third prong of *Chevron* that retroactive application would produce substantial inequitable results. *Ackinclose*, 845 F.2d at 935.

Circuit in *Fernandez*, the Tenth Circuit in *Jones*, and the Eleventh Circuit in *Ackinclose* not only rejects the first prong of *Chevron* as a "threshold" test, but also recognizes, consistent with *Chevron*, that the prospectivity question requires an analysis of all three factors. Under this approach, which amicus California urges the Court to adopt, prospective application may be found proper upon a finding of a single *Chevron* factor.

C. The First Prong Of *Chevron* Should Be Liberally Interpreted In Favor Of A Finding Of A New Principle Of Law

The first prong of *Chevron* looks to whether the decision establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. *Chevron*, 404 U.S. at 106. Amicus California suggests that this prong should be read to militate against retroactive application, and in favor of prospective application, where the decision disapproves a practice this Court has arguably sanctioned in prior cases, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. *United States v. Johnson, supra*, 457 U.S. at 551; *Solem v. Stumes*, 465 U.S. 638, 464 (1984); see e.g., *Gosa v. Mayden*, 413 U.S. 665, 673 (1973) (plurality opinion) (applying nonretroactively a decision that "effected a decisional change in attitude that had prevailed for many decades").

D. The Second Prong Of *Chevron* Should Be Read To Recognize That The Purpose Of The Commerce Clause Would Not Be Furthered By Retroactive Application In State Tax Cases

The second prong of *Chevron* requires an examination of "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 404 U.S. at 107. Petitioner McKesson argues the Florida Supreme Court's decision will further the Commerce Clause's "protections of the national common market only if the decision is retroactive." McKesson Brief at 37. Similarly, petitioner ATA argues retroactivity is necessary to encourage state officials "to heed the national interests in interstate free trade instead of provincial local concerns that favor in-state over out-of-state taxpayers." ATA Brief at 29. What is not made clear by either petitioner is why *prospective* application does not sufficiently further these goals.

This country had "its immediate origin in the necessities of commerce" and "the entire purpose for which the delegates first assembled at Annapolis was to devise means for the uniform regulation of trade." *Gibbons v. Ogden*, 22 U.S. 11 (9 Wheat), 6 L.Ed. 23, 26 (1824). It was this void which prompted Alexander Hamilton to point out that "[t]he want of a power to regulate commerce" was one of the defects of the Articles of Confederation. Hamilton, The Federalist No. 22. But retroactivity is not needed to achieve these goals of "a uniform and steady system" of commerce. *Gibbons*, Ibid. Prospective application of this Court's decisions in *Scheiner* (*supra*) 107 S.Ct. 2829, and *Baccus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) will adequately preclude state enactments that unconstitutionally discriminate against interstate commerce. Whatever chill was imposed on interstate trade is in the past. *National Can Corp. v. Dept. of Revenue*, 749 P.2d 1286 (Wash. 1988), appeal dism'd & Cert. denied, 108 S.Ct. 2030 (1988). "The actual existence of a statute, prior to . . . [a determination of unconstitutionality] . . . is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot*

County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 (1940).

Petitioner ATA argues that limiting *Scheiner* to prospective application would do nothing to remedy the unconstitutional discrimination against out-of-state taxpayers that has already occurred. ATA Brief at 24. But this will be the situation in every case, and ATA essentially asks this Court for nothing less than a rule which would require retroactivity in *all* state tax cases. Obviously such a rule would be totally inconsistent with the Court's approach in *Chevron* where a three-factor test was set forth for reviewing the retroactivity issue. ATA's argument nullifies the *Chevron* test.

Petitioners ATA and McKesson also assert that retroactive application is required in order to provide an incentive for states to not enact, or reenact, unconstitutional levies. ATA Brief at 27, McKesson Brief at 40. But once again, what petitioners ask for is a rule which would require retroactive application in *all* Commerce Clause state tax cases. Retroactive application might be appropriate where a taxpayer can demonstrate a course of conduct by a state or states which leads to the inescapable conclusion that nothing less than retroactive application will deter imposition of an unconstitutional levy. But it cannot be assumed that retroactive application is required because states, absent retroactive application, will not have any incentive to enact constitutional statutes. Indeed, petitioner McKesson admits, "[p]resumably, states usually do not intend for their tax legislation to violate the federal Constitution." McKesson Brief at 39. If it is assumed states do not intend for their tax legislation to violate the federal Constitution, then there is no need to require retroactive application to "encourage" states to enact constitutional statutes.

E. The Third Prong Of *Chevron*, Balancing The Equities, Should Recognize That Taxes Are The Life-Blood Of The States

Under the third *Chevron* factor, a court must weigh "the inequity imposed by retroactive application." 404 U.S. at 107. "Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our

cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969). The equities in state tax cases favor prospectivity.

The two cases currently before the Court inject into the third *Chevron* factor an additional element not found in civil cases in general. That additional element is the importance of taxes to the states. Taxes "are the life-blood" of government. *Bull v. United States*, 295 U.S. 247, 259 (1935); *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 523 (1984). Taxes also occupy a special place in the area of judicial review. "In resolving constitutional challenges to state tax measures this Court has made it clear that 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.' [citations omitted.] Our review of tax classifications has generally been concomitantly narrow, therefore, to fit the broad discretion vested in the state legislatures." *Austin v. New Hampshire*, 420 U.S. 656, 661-662 (1975).

Amicus TEI argues that under a "properly framed inequity test", the examination should be whether "undue hardship" to the states, as opposed to "hardship", would result from retroactive application of a decision. TEI argues that under this analysis a different result obtains, for the "hardship" of which the states might complain is one of their own making, i.e., "the result of their own unconstitutional acts". TEI Brief at 15.

TEI's position finds no support in the law. Just as it would have produced "substantial inequitable results" in *Chevron* to have held the respondent therein "slept on his rights" at a time when he could not have known the time limitation that the law imposed upon him, so would it produce substantial inequitable results to hold in these cases that a state must return taxes collected at a time it could not have known the legal basis upon which it collected those taxes would at some later date be declared unconstitutional. TEI essentially advocates for a rule which looks to the burden upon the taxpayer and ignores the burden upon the state on the rationale that the state's burden is irrelevant to *Chevron's* equity analysis because such burden is of the state's own making. The "hardship" to Florida and Alabama is no more "the result of their own unconstitutional acts" than would be the

act of any party acting under color of a law later declared unconstitutional. The funds collected by a state under a tax enacted in good faith by its legislature to meet the growing burdens of state government are not for any private benefit or profit. They accrue to the public benefit for public purposes.

Statutory or even court made rules of law "are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973) (*Lemon II*). A consequence of this "fact of life" is that states rely upon statutory and court made rules of law in making decisions affecting revenue and, for this reason, financial hardship may result from retroactivity. The financial hardship to a state associated with retroactivity must be a major component of the *Chevron* equity analysis.

It is well established that a court may look to fiscal hardship and revenue effect when examining the retroactivity issue. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*) the Court held on June 28, 1971 that a Pennsylvania statutory program to reimburse nonpublic sectarian schools for certain secular educational services violated the Establishment Clause of the First Amendment. In *Lemon II*, the Court permitted Pennsylvania to reimburse nonpublic sectarian schools for services provided before June 28, 1971 when *Lemon I* was decided. 411 U.S. at 193-209. The Court in *Lemon II* recognized that the expenses incurred by the schools "in reliance on the state statute inviting the contract made and authorizing reimbursement for past services performed by the schools" offset "the remote possibility of constitutional harm" which would result from permitting Pennsylvania to keep its bargain with the schools. 411 U.S. at 203. The Court recognized in *Lemon II* that to deny the church-related schools any reimbursement for their services "would impose upon them a substantial burden which would be difficult for them to meet." 411 U.S. at 204.

Thus, the protection of fiscal interests is clearly a major consideration in any retroactivity analysis. See also *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 722 (1978) ("Retroactive liability could be devastating for a pension

fund."); *Florida v. Long*, 487 U.S. ____ (1988), 108 S.Ct. 2354, 2361-2363; *Camden I. Condominium Ass'n Inc. v. Dunkle*, 805 F.2d 1532, 1535 (11th Cir. 1986), cert. den. 107 S.Ct. 3266 (1987) ("the risk of insolvency for local governments, the risk of deep cuts in government services necessary to innocent citizens, and the risk of overtaxing innocent taxpayers are critical inquiries in this case.") This fiscal consideration is of paramount importance when the retroactivity issue involves state taxes, the state's "life-blood", which are collected and spent and then subsequently found to be unconstitutional.

CONCLUSION

For the reasons stated, this Court should reaffirm the validity of *Chevron*, and elaborate upon the application of the *Chevron* standard to civil cases which involve state taxes found to be unconstitutional.

DATED: February 21, 1989

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Nos. 88-192 and 88-325

Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MCKESSON CORPORATION,

Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

On Writ of Certiorari to the Supreme Court of Florida

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Petitioners,

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,

Respondents.

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION; JOINED BY THE MULTISTATE TAX COMMISSION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici will address the following question:

Whether *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), states the appropriate test for determining the availability of a tax refund as a remedy for a violation of the Commerce Clause.

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INTEREST OF THE *AMICI CURIAE*

Amici National Conference of State Legislatures, National League of Cities, National Governors' Association, U.S. Conference of Mayors, National Association of Counties, and International City Management Association are organizations whose members include state, county, and municipal governments and officials throughout the United States; they have a compelling interest in legal issues that affect state and local governments. *Amicus* Multistate Tax Commission is the official administrative agency of the Multistate Tax Compact. The Compact has been entered into by eighteen States and the District of Columbia as full members; ten additional States have joined the Commission as associate members.[1] The Commission has a vital and continuing interest in state tax disputes that may dramatically affect the administration of state tax systems.

These cases concern the effect of the invalidation of state tax statutes under the Commerce Clause. In both cases, petitioners brought suits in state court challenging the constitutionality of the taxes; in both cases the state supreme court ultimately held that the taxes discriminated against out-of-state taxpayers in violation of the Commerce Clause. In both cases the petitioners then demanded full refunds of the taxes collected during the period that the unconstitutional taxing schemes were in effect—claims that in each case ran into the hundreds of millions of dollars. These demands were rejected by both courts below.

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[1] The current full members are Alaska, Arkansas, California, Colorado, the District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, New Jersey, Ohio, Pennsylvania, and Tennessee. This brief should not be read to reflect the views of any member State that files a separate brief in this case.

Amici and their members have a profound practical interest in the refund rules that the Court will address in these cases. States and local governments draw much of their revenue from the taxation of entities that are engaged in interstate commerce. Yet, as the Court has repeatedly noted, its Commerce Clause jurisprudence is at times confusing and unpredictable; that problem is compounded by the changing nature of many state economies, which poses novel problems for state and local taxing authorities. These factors make it inevitable that taxing schemes occasionally will be found to run afoul of the Commerce Clause. If refunds for these violations are too readily available, state and local governments will face not only revenue shortfalls but also unexpected and potentially ruinous liability. At the same time, the prospect of disruptive refund liability will discourage States and local governments from tapping constitutionally permissible sources of funds.

Because *amici* have special expertise in tax litigation in state courts, and because they will be directly affected by the Court's decision here, they submit this brief to assist the Court in the resolution of these cases.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The petitioners in both of these cases assume that the availability of a refund is controlled by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and they accordingly devote virtually all of their arguments to a simple application of the three *Chevron* factors. But in doing so, petitioners skip over a more fundamental question: whether *Chevron* applies at all in cases against state governments brought in state courts pursuant to state causes of action. Questions of remedy and retroactivity that arise in lawsuits based on state law are, after all,

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[2] The parties have consented to the filing of this brief pursuant to Rule 36 of the Rules of this Court. Their letters of consent have been filed with the Clerk of the Court.

typically resolved by state courts according to their own rules. So far as retroactivity is concerned, "the choice for any state may be determined by the juristic philosophy of the judges of her courts" (*Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 365 (1932)), and this Court generally has left it to state courts to formulate remedies for state violations of the federal Constitution's Equal Protection and Supremacy Clauses. Against this background, petitioners plainly must shoulder the burden of establishing that use of a federal retroactivity test imposed by this Court—and the *Chevron* test in particular—is somehow compelled by federal law.

1. In our view, petitioners have not carried either part of their burden. They have failed even to attempt to demonstrate the propriety of using the *Chevron* test in these cases. Certainly, nothing in *Chevron* itself—a case involving a federal court dispute between private parties over the meaning of federal maritime law—suggests that its standard should control in suits against state governments brought in state courts. In fact, there are compelling reasons to make retroactivity the exception in such cases. "'[O]ne of the first principles of constitutional adjudication'" is "'the basic presumption of the constitutional validity of a duly enacted state or federal law'" (*Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973) (plurality opinion) (citation omitted)); holding States retroactively liable when their taxing officials relied on such laws in good faith "could seriously undermine the initiative of state legislative and executive officials alike." *Id.* at 207-208.

Beyond that, the imposition of retroactive liability on state and local governments may—and in these cases would—place dramatic and unexpected burdens not on wrongdoers, as in cases where such liability is imposed for violations of law by private parties, but on the "blameless and unknowing taxpayers" who ultimately

would have to foot the bill. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Of course, we recognize the force of petitioners' argument that persons injured by a State's violation of the Constitution should be made whole. But this consideration bears little weight when the violation involves the Commerce Clause, which does not create rights that are personal to the injured party.

2. More fundamental than the defects in the standard they offer is petitioners' failure to provide constitutional considerations justifying the creation of *any* federal refund rule by this Court for use in state proceedings. A federal rule of retroactivity is not necessary to deter constitutional violations; state courts can be trusted to apply their normal refund rules in a nondiscriminatory manner in adjudicating Commerce Clause claims, and to provide relief when state legislatures attempt to evade the requirements of the Clause.

At the same time, petitioners have no constitutional right to be "made whole" for the States' violations of the Commerce Clause. The Clause does not give petitioners an absolute entitlement to operate in interstate commerce without restriction; instead, it allocates power over commerce between the federal and state governments. The benefits that petitioners derive from the national free trade area that prevails in the absence of congressional action is incidental. The Clause thus was not designed to protect personal rights. And because the Clause does not secure any personal right of petitioners, it is a matter of indifference to the Constitution whether, once barriers to commerce are removed, a refund also is made available.

In any event, even if the Commerce Clause is understood to create rights that are in some sense personal to petitioners, it entitles them to no more than nondiscrimination. As in the equal protection area, a viola-

tion of this right may be cured by a mandate of future equal treatment; that mandate need not be extended into the past.

ARGUMENT

THE *CHEVRON* TEST SHOULD NOT CONTROL THE AVAILABILITY OF REFUNDS IN THESE CASES

A. The Constitution Does Not Require The Payment Of Tax Refunds When A State Tax Statute Is Struck Down As Unconstitutional

1. At the outset, it is clear that the Constitution does not, as a general rule, require the use of remedies for constitutional violations that will set aside completed transactions or disturb settled patterns of conduct. "'[T]he federal Constitution has no voice upon the subject' of retrospectivity" (*United States v. Johnson*, 457 U.S. 537, 542 (1982), quoting *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932)), and the Court's holdings in recent years accordingly "have emphasized that the effect of a given constitutional ruling on prior conduct 'is subject to no set "principle of absolute retroactive invalidity."'" *Lemon v. Kurtzman*, 411 U.S. 192, 198-199 (1973) (*Lemon II*) (citations omitted). *See Linkletter v. Walker*, 381 U.S. 618, 624 (1965).

The Court has applied this understanding in a variety of settings, declining to give retroactive effect to rulings involving a number of constitutional provisions. *See, e.g.*, *Lemon II* (First Amendment); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (Article III); *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (separation of powers); *Connor v. Williams*, 404 U.S. 549, 550-551 (1972) (Equal Protection Clause); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 213-214 (1970) (same); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (same). *See also Caban v. Mohammed*, 441 U.S. 380, 416 (1979) (Stevens, J., dissenting). The

Court has similarly declined to disturb completed transactions or to require full retroactive effect when implementing decisions that involve important federal statutory guarantees, such as the Voting Rights Act (*see Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969)); Title VII of the Civil Rights Act of 1964 (*see Florida v. Long*, 108 S. Ct. 2354 (1988); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 722-723 (1978)); and 42 U.S.C. § 1981 (*see Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2025 (1987)).

2. Citing two *Lochner*-era decisions—*Carpenter v. Shaw*, 280 U.S. 363 (1930) and *Ward v. Love County*, 253 U.S. 17 (1920)—the American Trucking Association (ATA) petitioners nevertheless suggest (Br. 28) that the Constitution, of its own force, mandates the payment of refunds when state taxes are collected under a scheme that subsequently is found to be unconstitutional.[3] The

[3] Petitioner McKesson argues (Br. 24-27) that this Court's holdings mandate the payment of refunds as a remedy for unconstitutional taxes. With the arguable exceptions of *Carpenter* and *Ward*, however, none of the cited cases even remotely supports such a proposition. Several simply invalidated state taxes under the Commerce or other Clauses. *Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940). Others held that a taxpayer whose property is overassessed in violation of the Equal Protection Clause may seek reduction of its assessment as a remedy, and cannot be obligated to seek relief in the form of a higher assessment for other taxpayers (*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923)), or that a State may remedy an equal protection violation by raising taxes on the favored class (*Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499 (1928)). *Atchison, T. & S.F. R.R. v. O'Connor*, 223 U.S. 280, 287 (1912), was a refund action brought in federal court; the Court noted that the State permitted actions for taxes mistakenly paid and "presume[d] that a judgment [of unconstitutionality] in the present action would satisfy the [state] law." And *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), can best be read as standing only for the proposition that "a taxpayer who has been

relatively short shrift that petitioners devote to what should be a dispositive argument, however, suggests that they have some doubt about the continuing vitality of these decisions. That doubt is well-placed.

Even at the time they were decided, there was room to question what the Court actually held in *Carpenter* and *Ward*. Language in decisions rendered immediately prior to *Ward* suggested that state sovereign immunity could be asserted to preclude federal constitutional claims in state court. *See, e.g., Palmer v. Ohio*, 248 U.S. 32, 34 (1918) ("The right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States"); *Hopkins v. Clemson Agricultural College*, 221 U.S 636, 642 (1911) (addressing a Fourteenth Amendment claim brought in state court, Court observed that "without [a State's] consent it cannot be sued in any court, by any person, for any cause of action whatever"). Indeed, in *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929), decided nine years after *Ward* and one year before *Carpenter*, the Court enjoined the collection of a Louisiana tax asserted to violate the Equal Protection Clause because state law would not allow for a refund if the tax ultimately were held to be unconstitutional, even where the taxpayer paid "under both protest and compulsion" (*id.* at 815); the Court's conclusion that this absence of a state remedy posed the risk of irreparable injury to the taxpayer (*ibid.*) certainly suggested that the Constitution would not of its own force mandate payment of a refund.

The years since *Carpenter* and *Ward* were decided have been no kinder to the decisions. Except in *Carpenter* itself

subjected to discriminatory taxation through the favoring of others" cannot, as his only remedy, "be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." That is the proposition for which *Iowa-Des Moines* has since been cited. *See Allegheny Pittsburgh Coal Co. v. Commission*, No. 87-1303 (Jan. 18, 1989), slip op. 9-10.

(which relied on *Ward*), this Court has never cited either decision for the proposition that States must make refunds available for taxes exacted in violation of the Constitution.[4] To the contrary, the Court in *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), expressly left it to a state court to determine the availability of a refund remedy after a state tax statute was invalidated under the Supremacy Clause (*id.* at 196-197)—precisely the constitutional violation at issue in *Carpenter*. Indeed, in recent years the Court has repeatedly declined to order refunds in cases striking down state taxing statutes under the Commerce Clause. Instead, the Court has remanded the cases to the state courts for a determination of the availability of refunds—a course the Court followed in both *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829, 2847-2848 (1987), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276-277 (1984), the decisions upon which the separate petitioners here relied in bringing their Commerce Clause challenges. *See also Tyler Pipe Industries v. Washington Dept. of Revenue*, 107 S. Ct. 2810, 2822 (1987). Such remands would hardly have been necessary had the Constitution of its own force required the payment of refunds.[5]

[4] ATA petitioners note (Br. 28) that *Carpenter* and *Ward* were cited several years ago by the Fifth Circuit (*United States v. Tax Comm'n*, 645 F.2d 4, 5 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981)). That decision, however, involved an action against the State by the United States, which is not subject to the defense of state sovereign immunity.

[5] In fact, giving *Carpenter* and *Ward* the reading contended for by petitioners would be inconsistent with the modern understanding of state sovereign immunity. It is true that some cases, such as *Carpenter*, *Ward*, and *General Oil Co. v. Crain*, 209 U.S. 211 (1908), may be read to support the proposition that state sovereign immunity cannot be asserted in state court as a bar to a claim grounded on the federal Constitution. The cases we cite above, however, point in the other direction. *See Palmer*, 248 U.S. at 34; *Hopkins*, 221 U.S. at 642. *See also Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883). And the Court's more recent decisions

B. State Courts Are Not Obligated To Use The *Chevron* Test To Determine The Availability Of Tax Refunds

The conclusion that the Constitution does not compel a refund is not the end of these cases, of course; it leaves the question how to decide whether refunds are available. The petitioners in both of these cases, however, offer an assumption in place of an answer to this question: they ground virtually their entire arguments on the bald assertion that the retroactivity test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), governs the availability of a refund when a state tax is invalidated as unconstitutional. They accordingly devote the vast bulk of their briefs to an analysis of the three *Chevron* factors. But in undertaking this inquiry, petitioners skip over a more fundamental question—whether *Chevron* applies at all to suits in state court that, like the ones in these cases, involve state causes of action. The ATA petitioners assume without discussion that *Chevron* controls the outcome; petitioner McKesson simply asserts (Br. 31) that *Chevron* must be applied in cases involving the federal Constitution, even when those cases are brought in state court pursuant to state refund statutes.

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under the Eleventh Amendment support the latter view. The Court has made it clear that the Amendment bars federal courts from entertaining actions against States seeking refunds for the unconstitutional collection of taxes. *See Edelman v. Jordan*, 415 U.S. 651, 668-669 (1974); *Kennecott Copper Co. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944). "[T]he significance of this Amendment," the Court has added, "'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985) (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984)). *See Pennhurst*, 465 U.S. at 98-99. By ratifying the Constitution, the States thus did not consent to the assertion against them of constitutional claims in federal court; it is unclear why, by the same ratification, they should be deemed to have waived the fundamental protection of sovereign immunity in their own courts. *See generally American Trucking Ass'ns, Inc. v. Conway*, 508 A.2d 408 (Vt. 1986), *cert. denied*, 107 S. Ct. 3262 (1987).

There is no reason, however, why this should be so. *Chevron* itself involved a nonconstitutional federal claim that had been brought in federal court. *See* 404 U.S. at 98-100. The decisions relied upon by the *Chevron* Court in formulating its retroactivity standard likewise all involved federal causes of action litigated in federal court,[6] as have the civil cases in which the Court has applied *Chevron* since 1971.[7] On its face, then, the *Chevron* test is most naturally read as stating a rule of federal common law that governs the remedies awarded by the federal courts in federal lawsuits. Petitioners do not explain why the *Chevron* standard should be extended beyond that category of cases.[8]

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[6] *See Hanover Shoe, Inc. v. United States Shoe Machinery Corp.*, 392 U.S. 481 (1968) (federal antitrust action); *Linkletter v. Walker*, 381 U.S. 618 (1965) (federal habeas corpus); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (federal action under Equal Protection Clause); *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (action under Voting Rights Act); *England v. State Board of Medical Examiners*, 375 U.S. 411 (1964) (federal abstention rules); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) (federal res judicata rules).

[7] *See Saint Francis College*, 107 S. Ct. at 2025; *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2621 (1987); *Northern Pipeline*, 458 U.S. at 87-88. *See also Long*, 108 S. Ct. at 2359; *Norris*, 463 U.S. at 1105-1107; *Manhart*, 435 U.S. at 722-723. *Cf. Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1306 (1986) (Powell, J., dissenting).

[8] The Court has departed from *Chevron* in the criminal area, holding that a new constitutional rule should be applied to all cases pending on direct review—but not, evidently, to cases in which final judgment already had been entered—at the time the rule was adopted. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *compare Allen v. Hardy*, 478 U.S. 255 (1986). In adopting this approach, the Court has pointed to considerations derived from Article III of the Constitution, reasoning that, once a new rule of criminal procedure is announced, "the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review"; "selective application of new rules violates the principle of treating similarly situated defendants the same." *Griffith*, 479 U.S.

In fact, in our view there are compelling reasons for this Court *not* to mandate use of the *Chevron* test by state courts in circumstances like those presented here—where the plaintiffs are seeking remedies from state governments pursuant to state refund procedures for violations of the Commerce Clause. If the Court believes that a federal rule governing remedy is necessary in such cases, proper solicitude for the character of state governments and an appreciation of the nature of the Commerce Clause suggest that a refund should be mandated—as a matter of federal law—only when the unconstitutionality of the taxing statute is plain. But we believe that there is no need for this Court to impose its own rule of retroactivity; as in other settings, questions of remedy are best left to the state courts to resolve as a matter of state law. We address these points in turn.

1. *The* Chevron *test fails to take into account the special nature of the government defendant.*

Despite the amount of space they devote to the *Chevron* test, the ATA petitioners recognize (Br. 12-13) that another standard may be appropriate to govern the availability of tax refunds, although the test they offer would establish a rule of absolute retroactivity when a governmental entity is held to have violated the Commerce Clause. While petitioners are correct in suggesting that

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at 323. *See United States v. Johnson*, 457 U.S. 537, 546-548, 555 (1982). These considerations plainly do not mandate the award of refunds here. Both sets of petitioners obtained the benefit of the Commerce Clause rules for which they contended: the unconstitutional taxes were invalidated. Indeed, the Arkansas Supreme Court in *ATA* gave petitioners the benefit of a new constitutional rule announced in *Scheiner*, a decision rendered while *ATA* was pending on direct review. *Griffith* plainly does not speak to the further question of remedy in Commerce Clause litigation such as that involved here. In any event, it hardly need be added that the federal interest in freeing persons who were incarcerated in violation of the Constitution is very different from the considerations determining the availability of a refund remedy in a civil lawsuit.

a departure from *Chevron* is appropriate, we believe that their proposed standard draws precisely the wrong lesson from this Court's decisions.

The ATA petitioners base their alternative standard on *Owen v. City of Independence*, 445 U.S. 622 (1980), which they read to support the proposition that governmental entities always should be required to make full recompense for constitutional injuries. But *Owen* is inapposite here. There, the Court held only that a municipality could not assert good faith immunity as a bar to suit under 42 U.S.C. § 1983. The question in *Owen* was "essentially one of statutory construction" (445 U.S. at 635), and was resolved by looking to the history and purposes of Section 1983 (*see id.* at 635-636, 640-650, 657). *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). The Court thus held in *Owen* that, for purposes of amenability to suit, municipalities should be treated *identically* to private entities. *See* 445 U.S. at 639, 640. That holding plainly falls far short of a conclusion that governments have *special* obligations to pay refunds or offer other forms of retroactive remedies in circumstances where private parties would not be liable for that relief.[9]

In fact, in a setting that is analogous to the one here—where the issue involved remedy rather than amenability to suit—the Court made it clear that the status of the defendant as a governmental entity provides special fac-

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[9] It is worth noting that a Section 1983 action for a refund is very likely unavailable in these cases. Money damages may not be awarded against States in Section 1983 actions in federal court. *See Quern v. Jordan*, 440 U.S. 332 (1979). The Court recently heard arguments on the question whether States are "persons" who may be sued under Section 1983 in their own courts, *Will v. Michigan State Police*, No. 87-1269 (argued Dec. 5, 1988); as we explain in our brief in that case, we believe that they are not. In any event, as we note below (at 22-23), there is serious doubt that violations of the Commerce Clause are cognizable under Section 1983.

tors cutting *against* the undoing of settled transactions as a remedy, at least where the constitutional standard governing liability was doubtful:

> Appellants would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fail. In our view, appellants' position could seriously undermine the initiative of state legislative and executive officials alike. Until judges say otherwise, state officers * * * have the power to carry forward the directives of the state legislature.

Lemon II, 411 U.S. at 207-208 (plurality opinion). The *Lemon* Court therefore refused to set aside transactions that the State had entered into with private parties in violation of the Establishment Clause. In the absence of compelling constitutional considerations mandating retroactivity (*see id.* at 201-203), the Court added that "[w]e do not engage lightly in post hoc evaluation of such political judgment, founded as it is on 'one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law'" (*id.* at 208; quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 60 (1973)); "absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Id.* at 208-209.

Other, related considerations reinforce the conclusion that governmental units pursuing the public's business should receive more solicitude in the formulation of remedies than private entities pursuing private ends. The ATA petitioners demonstrate a profound misunderstanding of the fiscal realities facing state and local governments when they cavalierly suggest that States found liable for refunds may suffer "at most inconvenience" (Br. 35) and that "the refunds can be financed by new tax

levies" (Br. 37). In a time of almost universal budget deficits and changing economies (*cf.* Academy for State and Local Gov't, *Where Will the Money Come From: Finding Reliable Revenue for State and Local Governments in a Changing Economy* (1986)), it is hardly a simple matter for a State or a local government suddenly to make unexpected outlays of hundreds of millions of dollars. Pointing to these considerations, Justice Powell, writing for five Justices in *Norris*, concluded that the imposition of retroactive monetary liability on a State was—*Owen* notwithstanding—inappropriate in an action under Title VII.

Noting that "the cost [of retroactive relief in *Norris*] would fall on the State of Arizona," and that "[p]resumably other state and local governments also would be affected directly" by the Court's decision, the Court explained: "Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial financial deficits. Income, excise, and property taxes are being increased." Because the illegality of Arizona's conduct had not been settled until the decision in *Norris* itself, the Court saw "no justification * * * to impose this magnitude of burden retroactively on the public." 463 U.S. at 1106-1107. *See id.* at 1110 (O'Connor, J., concurring). *Cf. Long*, 108 S. Ct. at 2362-2363.[10]

These observations point up a central difference between liability imposed on public, as opposed to private,

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[10] Indeed, dissenting in *Scheiner*, Justice O'Connor noted the reliance interest that States have in expected sources of revenue; specifically pointing to the Arkansas tax at issue here, Justice O'Connor explained that Arkansas "opened its highways to the heaviest trucks only upon the understanding that it might collect sufficient revenue from those trucks by means of flat taxes to compensate for the damage they do to its roads. If this flat tax is also unconstitutional, then Arkansas is left with the damage but without the taxes." 107 S. Ct. at 2849 (O'Connor, J., dissenting). The disruption to the State's finances obviously will be compounded many-fold if invalidation of the tax is combined with retroactive liability.

defendants. When a private party acts to further its own ends in an area where the law is unsettled, there is no inequity in holding it fully liable if it is found to have violated the law; doing so will simply require it to bear the costs that it incurred in pursuit of its private purposes. When a State or a local government is held liable, in contrast, the ultimate burden falls not on a wrongdoer but on "the shoulders of blameless or unknowing taxpayers" (*Fact Concerts*, 453 U.S. at 267) in the form of higher taxes or—perhaps more likely, given strapped state treasuries—reduced benefits. *Cf. ibid.*; *id.* at 271. At least in the Commerce Clause context, it is no answer to this that "'it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated'" (ATA Br. 34, quoting *Owen*, 445 U.S. at 655). As we explain more fully below (at 21-23), the Commerce Clause does not create rights that are personal to the taxpayer; instead, it allocates power between the national and state governments. A Commerce Clause violation therefore does not deprive an injured party of something to which it was "entitled" in the same sense as does a due process violation of the sort at issue in *Owen*. The balance therefore tips in favor of the public and against the private interests.

2. The availability of a refund is a question of remedy that should be settled by state courts as a matter of state law.

a. The considerations outlined above suggest that *Chevron* should not govern in these cases. Rather than create a new rule of retroactivity or remedy, however, the Court can best reconcile the competing interests here by allowing the state courts to determine the availability of a refund according to state law. As a general matter, after all, questions of remedy that arise in state causes of action are resolved by state courts according to their

own rules. As this Court explained more than 50 years ago, in perhaps its most famous statement on the subject of retroactivity, "[a] state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward"; "[t]he choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 365 (1932). *See Havemeyer v. Iowa County*, 70 U.S. (3 Wall.) 294, 303 (1865); *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 206 (1863). Of course, state courts are free to apply the *Chevron* standard (or something that looks like it) in settling upon appropriate remedies—and many do[11]—but their misapplication of *Chevron* in a lawsuit grounded on state law does not provide federal grounds for complaint.

Absent overriding federal constitutional considerations, the availability of a tax refund—which involves "essentially issues of remedy" (*Bacchus*, 468 U.S. at 276-277)—therefore should be settled by state law. And the simple fact that the injury giving rise to the remedy involved the federal Constitution does not make reference to state law inappropriate. After invalidating underinclusive state programs under the Equal Protection Clause, for example, the Court has left it to the state courts to determine, as a matter of state law, whether the pool of beneficiaries should be expanded or contracted. *See Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 624 (1985); *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982).

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[11] *See, e.g., Nat'l Can Corp. v. Washington Dept. of Revenue*, 109 Wash.2d 878, 749 P.2d 1286, *app. dismissed and cert. denied*, 108 S. Ct. 2030 (1988); *Salorio v. Glaser*, 461 A.2d 1100 (N.J.), *cert. denied*, 464 U.S. 993 (1983). Some States, however, have developed their own retroactivity tests. *See, e.g., Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W.Va. 1986), *app. dismissed*, 107 S. Ct. 1949 (1987).

See also Williams v. Vermont, 472 U.S. 14, 28 (1985). The Court has followed an identical course in leaving to the state courts the formulation of a remedy for a violation of the Supremacy Clause. *Exxon Corp.*, 462 U.S. at 196-197. Indeed, in the Commerce Clause area the Court already has at least implicitly acknowledged the relevance of state law in determining entitlement to a refund; the Court has declined to resolve refund claims coming from state courts, explaining that it would "not take upon itself in this complex area of state tax structures to determine how to apply its holding[s]." *Tyler Pipe Industries*, 107 S. Ct. at 2822. *See Bacchus*, 468 U.S. at 276-277. This course, we believe, is a sensible one. Leaving the development of remedies to the state courts may give States a flexibility that will benefit both out-of-state taxpayers and the public: States may, for example, use tax credits or other forms of relief in the place of more disruptive refunds.

Having said this, we recognize that there obviously are federal components to the questions here: one of these cases involves the effect to be given a decision of this Court rather than, as in *Sunburst*, of the highest court of a State; in both cases the controversy that led to the remedy question involved the meaning of the federal Constitution, although petitioners proceeded under state refund statutes. It therefore might be appropriate for this Court to mandate the use of particular (or nationally uniform) remedies if doing so were necessary to effectuate the Commerce Clause.[12] *Cf. Chapman v.*

[12] Unless it is necessary to effectuate the Commerce Clause—and as we explain in text, it is not—there are no federal policies here militating in favor of the creation of a nationally uniform refund remedy. *Compare West Virginia v. United States*, 107 S. Ct. 702, 705-707 (1987); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). To the contrary, the area of taxation is one in which the State's interest in using its own rules is especially compelling. *See, e.g., Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). *See generally United States v. Yazell*, 382 U.S. 341 (1966).

California, 386 U.S. 18, 21 (1967). Absent the existence of a special federal interest that would be furthered by particular remedies, however, the choice of remedy should be left to state law. And as we explain below, there is no such federal interest in these cases.

b. Petitioners assert (ATA Br. 28-33; McKesson Br. 37-40) that a federal rule mandating retrospective relief is necessary to deter state legislatures from enacting, and state executives from enforcing, tax schemes that are inconsistent with the Commerce Clause. But this argument proves too much. It leads to the conclusion that retrospective relief should be awarded by this Court whenever governmental entities are found to have acted in violation of the Constitution or federal law, except perhaps in cases where the invalidity of the governmental action could not possibly have been anticipated. As noted above, however, the Court has rejected such an approach. Indeed, in other contexts the Court has found that the specter of retrospective liability is not necessary "to ensure compliance with [its] decisions." *Long*, 108 S. Ct. at 2362. *See Norris*, 463 U.S. at 1106-1107 (opinion of Powell, J.,); *id.* at 1110 (O'Connor, J., concurring). Moreover, given the highly disruptive effects of retrospective liability, petitioners' approach threatens to overdeter by "undermin[ing] the initiative of state legislators and executive officials alike." *Lemon II*, 411 U.S. at 207-208 (plurality opinion).

More fundamentally, petitioners themselves distort the Constitution when they suggest (ATA Br. 29-30 & n.20) that the Court should create special constitutional remedies because state courts cannot be trusted to adjudicate evenhandedly claims grounded on constitutional violations. Noting that "Art. VI of the United States Constitution declares that 'the Judges in every State shall be bound' by the Federal Constitution, laws, and treaties," this Court repeatedly has refused "to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities." *Huffman v. Pursue, Ltd.*,

420 U.S. 592, 611 (1975). *See Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1528 (1987); *Moore v. Sims*, 442 U.S. 415, 430 (1979).

In fact, the performance of state courts would not support such an assumption. Those courts have, with regularity, invalidated state statutes that are inconsistent with the Commerce Clause; indeed, the Supreme Court of Florida did just that in *McKesson*. *See also, e.g., Huie v. Private Truck Council, Inc.*, 466 N.E.2d 435 (Ind. 1984). State courts also have awarded refunds to taxpayers in appropriate cases where tax statutes were invalidated under the Commerce Clause or other provisions of federal law.[13] As decisions cited by the ATA petitioners indicate (Br. 31-32 n.22), state courts have similarly been willing to provide retroactive relief when legislatures attempted to evade the Commerce Clause by enacting successive, unconstitutional levies. And when state courts have declined to make refunds available after finding tax statutes inconsistent with the Commerce Clause or other provisions of federal law, they generally have accompanied their holdings with carefully considered analyses of the factors discussed above: reliance by state authorities on the presumptive constitutionality of legislation, in combination with a well-founded fear that retroactive relief would have devastating fiscal consequences

[13] *See, e.g., Huie v. Private Truck Council, Inc.*, 466 N.E.2d 435 (Ind. 1984) (previously collected taxes escrowed and then refunded in Commerce Clause case); *Burlington Northern R.R. Co. v. Board of Supervisors*, 418 N.W.2d 72 (Iowa 1988) (refund where state tax preempted by federal law); *LaRoque v. State*, 583 P.2d 1059 (Mont. 1978) (tax invalidated as inconsistent with federal law; refund available if taxpayers complied with state refund procedures); *Westinghouse Electric Corp. v. Tully*, 63 N.Y.2d 191, 470 N.E.2d 853 (1984) (Commerce Clause violation; court remanded for recomputation of tax). *See also Midland Bank & Trust Co. v. Olsen*, 717 S.W.2d 580 (Tenn. 1986) (refund available from time of decision establishing illegality of tax).

for the public.[14] The record thus demonstrates no need for intervention by this Court.

c. Petitioners also assert (ATA Br. 27-28; McKesson Br. 37-38) that refunds would provide the relief necessary to make them whole for the States' violations of the Commerce Clause. As we suggested above, however, this assertion misunderstands the nature of the interests protected by the Clause.

The Commerce Clause does not absolutely entitle taxpayers to a right to trade freely between the States. It does not, after all, "limit the authority of *Congress* to regulate commerce among the several States as it sees fit," or detract from Congress's authority to " 'confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.' " *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652 (1981) (emphasis in original) (quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980)). *See Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). Thus, nothing in the Clause gives individuals a right to engage in commerce; instead, it allocates the authority to regulate commerce "between the national and state governments" (*Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 (1945)), implementing "the great constitutional purpose of the fathers" to grant Congress rather than the States "the power 'To regulate Commerce with foreign Nations, and among the several States . . .' " *Nippert v. City of Richmond*, 327 U.S. 416, 425 (1946). The Court's decisions in the Commerce Clause area are

[14] *See, e.g., Salorio v. Glaser*, 461 A.2d 1100 (N.J.), *cert. denied*, 464 U.S. 993 (1983); *Metropolitan Life Insurance Co. v. Commissioner*, 373 N.W.2d 399 (N.D. 1985); *First of McAlester v. Oklahoma Tax Comm'n*, 709 P.2d 1026 (Okla. 1985); *Nat'l Can Corp. v. Washington Dept. of Revenue*, 109 Wash.2d 878, 749 P.2d 1286, *app. dismissed and cert. denied*, 108 S. Ct. 2030 (1988); *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W.Va. 1986), *app. dismissed*, 107 S. Ct. 1949 (1987).

accordingly "replete with references to the *national* or *federal interests* in preventing the burdensome state regulation of interstate commerce." *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984) (emphasis in original) (citing *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959); *H.P. Hood & Sons, Inc., v. DuMond*, 336 U.S. 525, 537-542 (1949); *Southern Pacific*, 325 U.S. at 775-776).

Of course, individuals may benefit from the existence of the national free trade area that, in the absence of restrictive congressional action, is created by the dormant Commerce Clause. But that benefit is incidental. Unlike the Bill of Rights and the personal guarantees of the Civil War Amendments, the Commerce Clause was designed to serve national rather than individual ends by forestalling the "drift toward anarchy and commercial warfare" that "came 'to threaten at once the peace and safety of the Union.'" *Hood & Sons*, 336 U.S. at 533 (quoting J. Story, *The Constitution*, Secs. 259-260). *See* 336 U.S. at 534, 537.[15] Thus, despite occasional references in this Court's opinions "to a right to engage in interstate commerce, * * * the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy." *Consolidated Freightways*, 730 F.2d at 1145.[16] *See id.* at 1144. It is for this reason that,

[15] "It is true that the litigation is between private parties, but the issues touch the relative jurisdiction of nation and state." Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 22-23 (1940).

[16] As Professor Choper has noted, "when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. * * * [W]hen a person alleges that one of the federalism provisions of the Constitution has been violated, he implicitly concedes that one of the two levels of government—national or state—has the power to engage in the questioned conduct. The core of the argument is simply that the particular government that has acted is the constitutionally improper one." J. Choper, *Judicial Review in the National Political Process* 174-175 (1980).

as Justice White has noted, the "weight of authority" recognizes that a Commerce Clause violation is not cognizable under 42 U.S.C. § 1983. *Private Truck Council of America, Inc. v. Quinn*, 476 U.S. 1129 (1986) (White, J., dissenting from the denial of certiorari). *See, e.g., Consolidated Freightways*, 730 F.2d at 1144-1146; *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848-849 (9th Cir.), *cert. denied*, 479 U.S. 1060 (1987) (no Section 1983 cause of action to challenge violation of another power-allocating provision of the Constitution, the Supremacy Clause). *See also Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 612-615 (1979) (violation of the Supremacy Clause does not infringe rights "secured by the Constitution" within the meaning of 28 U.S.C. § 1343(3)); *Connor v. Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938), *aff'd*, 305 U.S. 576 (1939) (predecessor to 28 U.S.C. § 1343(3) did not provide jurisdiction for a dormant Commerce Clause claim). *See generally White Mountain Apache Tribe*, 810 F.2d at 849-850.

Against this background, petitioners err when they suggest that they somehow are entitled to redress for the burden placed upon them by virtue of the States' violations of the Commerce Clause. The Clause safeguards the national interest in the free flow of commerce; the Arkansas Supreme Court was thus correct in holding (ATA Pet. App. 4a) that the principal purpose of the Clause is vindicated when state barriers to commerce are dissolved. *See Nat'l Can Corp. v. Washington Dept. of Revenue*, 109 Wash. 878, 749 P.2d 1286, *app. dismissed and cert. denied*, 108 S. Ct. 2030 (1988). Because the Clause does not secure any personal right of petitioners, it is largely a matter of indifference to the Constitution whether a refund remedy is available as well.

d. In any event, even if the analysis above is incorrect —that is, even if the Commerce Clause creates a right that is in some sense personal to the out-of-state taxpayer —the Clause plainly does not entitle the taxpayer to any particular level of tax. At best, out-of-state taxpayers like petitioners have a right to nondiscrimination in the form of treatment equal to that accorded in-state taxpayers. As the Court has noted time and time again, it is discrimination between residents and non-residents that is the hallmark of a Commerce Clause violation. *See, e.g., Scheiner*, 107 S. Ct. at 2839; *Tyler Pipe Industries*, 107 S. Ct. at 2828-2829; *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984); *Lewis*, 447 U.S. at 36-37; *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287-288 (1977); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977); *Nippert*, 327 U.S. at 425; *McGoldrisk v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 35, 49 (1940).

Any personal rights that exist under the Commerce Clause are therefore closely analogous to those created by the Equal Protection Clause (or the equal protection component of the Fifth Amendment's Due Process Clause). As in the Commerce Clause setting, "the right to equal treatment guaranteed by the Constitution['s Equal Protection Clause] is not coextensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). This means that the remedy for a program found to be discriminatory under the Equal Protection Clause is "a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by expansion of benefits to the excluded class." *Id.* at 740 (emphasis in original). *See Califano v. Westcott*, 443 U.S. 76, 94-95 (1979) (opinion of Powell, J.). So far as we are aware, however, the Court has never suggested that either the federal or the state and local governments are obligated to remedy

equal protection violations by extending that mandate of equal treatment into the past. Such a doctrine would have incongruous results: it would mean, for example, that a State that improperly accorded special benefits to a small category of persons would either have to reclaim those benefits or make them retroactively available to everyone else in the population.

In our view, the Constitution does not require such an outcome. Indeed, the *Mathews* Court, far from requiring a retroactive equalization of benefits, permitted Congress to make continued use of an improper classification into the *future* to protect the reliance interests of the previously favored class. *See* 465 U.S. at 745-751. Similarly, as we note above, the Court has left it to state courts to determine, according to state law, how to remedy the defects in state programs that are found to violate the Equal Protection Clause. *See Hooper*, 472 U.S. at 624; *Zobel*, 457 U.S. at 64-65. *See also Exxon Corp.*, 462 U.S. at 196-197.[17] *Cf. Williams*, 472 U.S. at 28. The same reasoning compels the conclusion that a Commerce Clause violation is fully remedied when the State terminates the improper discrimination. Questions about the availability of any additional remedy should be left to the state courts to resolve under state law.

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[17] In these Equal Protection and Supremacy Clause cases the Court reasoned that the remedy question involved severance, leaving it to the state courts to determine whether benefit programs would have been enacted in the absence of the unconstitutional limitation. The holdings of the Florida courts below demonstrate the relevance of the equal protection analysis to the Commerce Clause: the Florida courts in effect severed the unconstitutional exemption, leaving the larger tax program in effect. See *McKesson* Pet. App. 27a.

CONCLUSION

The judgments of the Supreme Courts of Arkansas and Florida should be affirmed.

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February 21, 1989

(17) (15)

Nos. 88-192; 88-325

Supreme Court, U.S.
FILED
AUG 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

McKESSON CORPORATION,

Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Petitioners,

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, et al.,

Respondents.

On Writ of Certiorari to the Supreme Courts of the States of Florida and Arkansas

BRIEF AMICUS CURIAE OF THE CROW TRIBE OF INDIANS IN SUPPORT OF PETITIONERS

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On Writ of Certiorari to the Supreme Courts of the States of Florida and Arkansas

BRIEF AMICUS CURIAE OF THE CROW TRIBE OF INDIANS IN SUPPORT OF PETITIONERS

CONSENT TO FILING

Petitioners and Respondents in these consolidated cases have consented to the filing of this *Amicus Curiae* brief. Letters from counsel for all parties granting consent have been separately filed with the Clerk of this Court pursuant to Rule 36.2.

INTEREST OF THE CROW TRIBE OF INDIANS

The Crow Tribe of Indians is a federally recognized Indian Tribe with approximately 8000 members and a reservation of 2.3 million acres located entirely within the State of Montana. Beginning in 1975, the State of Montana adopted and enforced the nation's highest coal severance taxes and collected more than $53,000,000 from the Tribe's lessee between the years 1975 and 1983.

In 1988, this Court summarily affirmed a decision of the Ninth Circuit Court of Appeals holding Montana's coal severance taxes void on the grounds that they were pre-empted by federal law and policies and that the state taxes interfered with Tribal self-government. *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd* 484 U.S. 997 (1988). Still to be determined in that case is the refund and disposition of taxes paid by the Tribe's lessee between 1976 and 1983, together with interest thereon.[1]

[1] Westmoreland Resources, Inc., the Tribe's lessee actually paid Montana's taxes. The Crow Tribe, in 1976, adopted a tribal severance tax applicable to Westmoreland. The Tribe and Westmoreland have agreed that Westmoreland will receive a tribal tax credit for any taxes that it is required to pay Montana.

The Crow Tribe appears as *amicus curiae* to call attention to the possibility that a decision in these consolidated Commerce Clause cases could affect federally protected Indian rights in two ways. First, a ruling that Florida or Arkansas may retain taxes collected in violation of the Federal Constitution could make it difficult or impossible for the Crow Tribe to retrieve the enormous coal severance taxes collected by Montana. Secondly, the Crow Tribe wishes to voice its concern that nothing in the Court's disposition of these cases foreclose the Tribe's presumptive entitlement to interest in conjunction with its tax refund.[2]

SUMMARY OF ARGUMENT

Indians of necessity have sought the protection of federal law against the actions of states frequently hostile to them and contemptuous of their rights. Protection from invalid state taxes can be of transcendent importance to a Tribal government when, as in the case of the Crow Tribe, those invalid taxes appropriate the mineral wealth of the Tribe. To be meaningful, federal protection must require in every case the refund of illegally exacted state taxes.

[2] Montana, through its investment of severance tax money, has earned tens of millions of dollars in interest on monies paid by Westmoreland to Montana on account of the state's void tax. The Crow Tribal tax has been ruled valid, and it now appears that Westmoreland's tax payments should have been paid to the Crow Tribe rather than Montana.

This Court, for sound reasons, has consistently required states to refund taxes collected in contravention of federal law. Nonretroactivity, if applied in the cases before the Court, would eliminate this historic requirement. To sanction retention by a state government of funds exacted in violation of federal law stands the Supremacy Clause on its head.

To permit a state to retain monies unlawfully collected by the compulsive process of state tax law not only offends fundamental notions of fair play but such a result will also encourage state legislatures to act in defiance of federally protected rights as so plainly occurred in the Florida case before the Court and in the Montana case involving the Crow Tribe. Public policy demands that this Court reaffirm a rule which will deter rather than promote the parochialism of state legislators.

In tax refund cases, due to the passage of time, the award of interest can be of greater consequence than the tax refund itself. For example, Montana's void taxes were assessed against the Crow Tribe's lessee in 1975, and the Tribe's claim reaches back to that time. The Tribe's claim for interest is more than double the claim for taxes.

The time has come to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay. The Court has properly recognized that the traditional view, which treated prejudgment interest as a penalty awarded on the basis of the defendant's conduct, has long been criticized on the ground that prejudgment interest represents "delay damages"

and should be awarded as a component of full compensation.

This case may not provide the appropriate occasion to address the issue of prejudgment interest. Nevertheless, the Crow Tribe requests that the Court be mindful of the important role which interest can play in providing full compensation to an aggrieved taxpayer.

ARGUMENT

I. DECISIONS INVALIDATING STATE TAX STATUTES ON FEDERAL GROUNDS SHOULD ALWAYS BE APPLIED RETROACTIVELY.

This Court has repeatedly ruled that the Constitution mandates a refund of state taxes collected under laws which violate federal law or the Constitution itself. *E.g.*, *Ward v. Love County*, 253 U.S. 17 (1920); *Carpenter v. Shaw*, 280 U.S. 363 (1930). It is not surprising that both cases involved Indians who sought protection in the federal courts.

Historically Indians have been particularly vulnerable to improper state actions, including the collection of state taxes. Lacking economic or political power, they must rely on federal protection. Over a century ago, this Court made the following observation:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from

> them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

United States v. Kagama, 118 U.S. 375, 383-84 (1886) (Emphases in original).

In *Ward v. Love County*, 253 U.S. 17 (1920), this Court held that the Due Process Clause of the Fourteenth Amendment required Love County, Oklahoma to refund taxes to an Indian allottee. Said the Court:

> . . . if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. [citations omitted]. To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment. . . .

Id. at 24.

Ten years later in *Carpenter v. Shaw*, 280 U.S. 363 (1930), the Court made it clear that a state will not be allowed to vitiate federally protected rights. Thus a state could not, on state law grounds, seek to avoid the mandate of federal law.

> Where a Federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislature, or relieved by it from considering the real nature of the tax and its effect upon the federal right asserted.

Carpenter v. Shaw, supra, at 367-68. The Court reaffirmed the holding of *Ward v. Love County, supra*, "that a denial

by a state court of a recovery of taxes enacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the 14th Amendment." *Id.* at 369. *See, also, Montana Nat'l Bank of Billings v. Yellowstone County, Montana*, 276 U.S. 499, 504, 505 (1928) (unlawfully exacted funds cannot remain in public treasury); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (refund taxpayer's federal remedy); *Maryland v. Louisiana*, 451 U.S. 456, 457 (1981) (refund together with interest).

The above-cited cases reflect this Court's recognition of the result required by fundamental notions of fair play. Any other result would be plainly inconsistent with the Supremacy Clause, because it would subordinate constitutionally mandated rights to state interests.

In cases involving state taxation, moreover, there is no occasion to consider the narrow exception to the rule of retroactivity which applies where an unanticipated new rule could cause injustice to innocent parties by, for example, voiding marriages, making municipal bonds worthless, or retroactively changing limitation periods. *See, Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Taxation differs from the cases governed by the *Chevron* rule because it concerns money rather than legal status or rights. While in some instances a state may not anticipate that its tax law will be ruled unconstitutional, it will *never* be constitutionally acceptable to deprive a taxpayer of a refund on this account. The monies paid to the state are "property" within the meaning of the Fourteenth Amendment, and the state's permanent deprivation of a refund or other retrospective relief for a tax collected in violation

of federal law constitutes a forbidden taking. *Ward v. Love County, supra.*

Nor is it appropriate to reward states which violate federally protected rights. State legislators are elected to represent the popular, majoritarian interests of their districts. The behavior reflected by Florida's legislators in revising the revised products exemption without any serious regard to constitutional limitations, *see*, McKesson Corporation's Brief at 15-16, is similar to the Montana legislature's actions in deliberately disregarding the federally protected rights of the Crow Tribe with respect to the coal severance tax. If Florida, Montana, or Arkansas is permitted to retain any portion of its illegal tax revenue, then their disregard for federally protected rights will be inappropriately rewarded.

A very different result is required in order to foster concern for federally protected rights – particularly the rights of minorities. For this reason, the states in every instance should be required to refund all tax revenue collected in violation of federal law together with interest. *See, Maryland v. Louisiana*, 452 U.S. 456, 457 (1981).

II. ALL TAX REFUNDS MUST INCLUDE INTEREST.

In tax refund cases, due to the passage of time, the award of interest can be of greater consequence than the tax refund itself. For example, Montana's void taxes were assessed against the Crow Tribe's lessee in 1975, and the Tribe's claim reaches back to that time. The Tribe's claim for interest is more than double the claim for taxes.

The time has come to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay. *See, Waite v. United States*, 282 U.S. 508, 509 (1931) (interest from time of the taking necessary to constitute adequate compensation under the Fifth Amendment); *Miller v. Robertson*, 266 U.S. 243, 258 (1924) (prejudgment interest required for "full compensation").

The Court has properly recognized that the traditional view, which treated prejudgment interest as a penalty awarded on the basis of the defendant's conduct, has long been criticized on the ground that prejudgment interest represents "delay damages" and should be awarded as a component of full compensation. *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655 n. 10 (1983). An award of interest, moreover, is governed by federal, not state law. *See, West Virginia v. United States*, 479 U.S. 305, 308-09 (1987). Thus a state's failure to allow interest in state tax refund cases cannot preclude an award of interest where the refund is based on a deprivation of federal rights. *Cf., Board of County Commissioners v. United States*, 308 U.S. 343, 350 (1943).

This case may not provide the appropriate occasion to address the issue of prejudgment interest. Nevertheless, the Crow Tribe requests that the Court be mindful of the important role which interest can play in providing full compensation to an aggrieved taxpayer.

CONCLUSION

For the reasons stated above, this Court should reverse the judgments below with respect to the judgment of prospectivity and rule in favor of Petitioners.

Respectfully submitted,

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MOTION FILED
NOV 14 1989

No. 88-325

In the Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
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v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*, RESPONDENTS

On Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF FOR THE PETITIONERS ON REARGUMENT AND SUPPLEMENTAL BRIEF FOR THE PETITIONERS ON REARGUMENT

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On Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF FOR THE PETITIONERS ON REARGUMENT

Petitioners hereby move for leave to file the attached Supplemental Brief on Reargument. This case was argued on March 22, 1989. On July 3, 1989, the Court issued an order restoring the case to the calendar for reargument. On October 20, 1989, respondents moved for leave to file a brief on reargument. That motion was granted by the Court on November 6, 1989. The attached brief responds to the arguments set forth in respondents' brief on reargument.

Respondents' brief on reargument asserts that several decisions rendered by this Court last Term lend support to their position in this case. See Ark. Mot. ii; Rearg. Br. 5-8, 11-13. In fact, as the attached brief explains (at 4, 8, 11), one of the decisions—*Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273 (1989)—actually supports peti-

tioners' position before this Court. The attached brief further explains why the other cases cited by respondents are irrelevant to the issue presented for decision in this case.

Respondents' reargument brief also elaborates upon and revises several factual arguments that respondents presented in their earlier brief in this case. It is our submission that the new version of these arguments is based on a complete misreading of this Court's decision in *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), and of the record in this case. However, as respondents themselves acknowledge (Mot. iii), "these arguments cannot be readily answered except in writing."

This Court's procedures give the petitioner in every case the right to respond to arguments advanced by the party that prevailed in the court below. See, *e.g.*, Sup. Ct. R. 35. The arguments presented in respondents' latest brief are new or materially altered from their earlier submissions, else there would have been no basis for them to submit a further brief. Considerations of basic fairness dictate that petitioners should be granted an opportunity to respond to these arguments.

For the foregoing reasons, petitioners request leave to file the attached Supplemental Brief on Reargument.

Respectfully submitted.

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NOVEMBER 1989

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-325

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*, RESPONDENTS

On Writ of Certiorari to the Supreme Court of Arkansas

SUPPLEMENTAL BRIEF FOR THE PETITIONERS ON REARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

When the instant case arrived in this Court, it presented what appeared to be a significant but relatively straightforward question of federal law regarding the retroactivity of a Commerce Clause decision of this Court —*i.e.*, whether petitioners' request for refunds of flat highway taxes exacted between the filing of this suit in May 1983 and the entry of Justice Blackmun's escrow order in August 1987 would be governed by the Commerce Clause principles applied in June 1987 in *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987).

To the extent that the Arkansas Supreme Court found *Scheiner* applicable (*i.e.*, to HUE tax payments made after Justice Blackmun's escrow order), it ordered refunds. Its refusal to grant refunds of earlier payments was based entirely on its application (or misapplication) to *Scheiner* of the federal retroactivity rule announced by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97

(1971). See Pet. App. 3a. In opposing certiorari, Arkansas too acknowledged that only the federal question of *Scheiner*'s retroactivity would be before this Court, pointing out that "[t]he Arkansas Supreme Court * * * did not reach questions of state law * * * [such as] Sovereign Immunity." Br. in Opp. 4.

Once certiorari had been granted, however, Arkansas, supported by its amici National Conference of State Legislatures, *et al.* (NCSL), changed its tack dramatically, bombarding this Court with a wide variety of arguments designed to persuade it that somehow or other it could not reach the issue decided below and taken for review. Among the reasons advanced in this anything-but-*Chevron* flurry of contentions are: that the Eleventh Amendment forecloses this Court from exercising its appellate jurisdiction over this case; that the Commerce Clause confers no right to monetary relief upon those injured by its violation; that refunds were denied on grounds of sovereign immunity, which trumps any federal constitutional refund right that might otherwise be available; and that petitioners have failed to demonstrate that the HUE tax inflicted any constitutional injury upon them.

Not only do these arguments lack merit, but, apart from the insubstantial attack on this Court's appellate jurisdiction, they have no place at this stage of the case. There is no question here of "the Court subject[ing] Arkansas to monetary liability" (Ark. Rearg. Br. 2), although the Court has been willing to do precisely that where appropriate. See *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239 (1931) (Brandeis, J.) (explicitly enforcing a federal right to a refund of taxes that discriminated against national banks). Rather, the Court's decision in this case, like those in the cases listed in the Appendix to our Reply Brief, would simply be a step in a process that might ultimately lead to refunds. It therefore does not matter whether a sovereign immunity defense might be recognized on remand or whether there is a federal right

to refund relief; as the case now stands, it is *state* law that will entitle petitioners to some form of refund relief if *Scheiner* is retroactive as a matter of federal law. See Pet. App. 3a ("[t]o hold the interstate truckers were entitled to [refunds] * * *, we would have to apply the *Scheiner* decision retroactively").

In any event, relevant or not, the State's latest arguments are erroneous.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR THIS COURT FROM EXERCISING APPELLATE JURISDICTION OVER THE DECISION BELOW

Arkansas' brief on reargument largely ignores the principal contention in its initial brief—that the Eleventh Amendment bars the Court from exercising appellate jurisdiction over this case. (Arkansas has instead constructed another argument based on the Eleventh Amendment, which we address at pages 6-9, *infra*.) We here add only a few thoughts to our prior discussion (Rep. Br. 1-8) of the original Eleventh Amendment argument.

First, Arkansas contends (Rearg. Br. 9-10 n.7) that "many" of the cases cited in our reply brief (at 3-4) are compatible with its Eleventh Amendment theory because in those cases "the state taxes were paid under 'protest,' and recovery of the tax payments was sought through a refund procedure established by State law." Arkansas thus apparently concedes that the Eleventh Amendment does not bar this Court from adjudicating such a case. But this concession is fatal to its argument, for the instant case fits squarely within that category: petitioners filed suit before any HUE taxes were paid and now seek a refund pursuant to state law (Ark. Const., Art. 16 § 13).[1]

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[1] Under Arkansas law, the filing of a suit is the equivalent of payment under protest, see *City of Little Rock* v. *Cash*, 644 S.W.2d 229, 234 (Ark. 1982), cert. denied, 462 U.S. 1111 (1983).

Second, the Court decided several more cases last Term that would fall outside its jurisdiction under Arkansas' view of the Eleventh Amendment, further illustrating the dramatic contraction in the Court's authority that would result from adoption of Arkansas' theory. See *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989); *Cotton Petroleum Corp.* v. *New Mexico*, 109 S. Ct. 1698 (1989); *Frazee* v. *Illinois Dep't of Employment Security*, 109 S. Ct. 1514 (1989).

In addition, Justice Stevens' separate opinion in *Pennsylvania* v. *Union Gas Co.*, 109 S.Ct. 2273 (1989), squarely rejects Arkansas' approach. Justice Stevens observed that the Court has "balanc[ed] * * * state and federal interests" in determining whether the Eleventh Amendment limits the jurisdiction of the federal courts in a particular context. *Id.* at 2288; accord, *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105-106 (1984). He concluded that this approach explains why the Court "has repeatedly exercised Article III power to review state-court judgments in cases involving claims that, under [the Court's] post-*Hans* decisions, could not have been brought in federal district court" (109 S.Ct. at 2288 n.3). "[I]f our post-*Hans* state immunity cases are * * * understood as premised on a prudential balancing of state and federal interests, these cases are easily explained: a state-court decision defining federal law tips the balance in favor of federal review" (*ibid.*). This is why Arkansas' attempt to limit this Court's authority must fail.[2]

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[2] Arkansas contends (Rearg. Br. 11-12 & n.9) that the relevant interests balance differently, but it ignores the fact that its rule would preclude review by this Court in any case in which the violation of federal law has ended, thus preventing this Court from ensuring that federal law is correctly, and uniformly, interpreted by state courts. See ATA Rep. Br. 6-7; *Massachusetts* v. *Oakes*, 109 S.Ct. 2633 (1989) (discussed at ATA *McKesson* Am. Br. 20-21).

II. THIS COURT'S POWER TO REVIEW THIS CASE DOES NOT DEPEND ON THE EXISTENCE OF A FEDERAL REFUND RIGHT

Arkansas clings (Rearg. Br. 13-16) to its contention that petitioners' refund claim rests entirely on federal law. As we discussed in our reply brief (at 9; see also *id.* at 6-7 n.8), that view of the case is simply wrong. Arkansas itself acknowledged in opposing certiorari (Br. in Opp. 3) that the decision below did not adopt the State's arguments that refunds would be barred as a matter of Arkansas law; rather it held that refunds were not available because the court believed that, under the federal standard set forth in *Chevron*, the decision in *Scheiner* should not be applied retroactively.

There can in fact be no doubt that Arkansas law creates a cause of action for the refund of illegally exacted taxes. See ATA Rep. Br. 9. The only question that is even arguable is whether, when the State is the taxing authority, sovereign immunity insulates it from the otherwise applicable state-law refund obligation. But that question of Arkansas law, which the State correctly conceded at the certiorari stage was not the basis of the decision below, plainly should not be addressed by this Court.[3]

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[3] Apart from the Arkansas authorities cited in our Reply Brief (at 6-7 n.8) and not rebutted in Arkansas' latest brief, there are other reasons to believe that sovereign immunity is not a bar to a tax refund action in Arkansas. Sovereign immunity is a jurisdictional bar under Arkanas law (*McCain* v. *Crossett Lumber Co.*, 174 S.W.2d 114, 120 (Ark. 1943)), and the issue was fully briefed to the Arkansas Supreme Court. If that court viewed sovereign immunity as a serious obstacle to its consideration of the refund claim, it presumably would have addressed the issue. In addition, the Arkansas Supreme Court has held that sovereign immunity would not preclude the award of credits against future taxes to offset an unconstitutional exaction; that is one form of retrospective relief that could be afforded to petitioners if *Scheiner* is retroactive. See *Federal Compress & Warehouse Co.* v. *Call*, 254 S.W.2d 319 (Ark. 1953). And the Arkansas Department of Revenue has

Arkansas also errs in asserting (Rearg. Br. 14-15 n.13) that if state law supplied the cause of action, no federal question would be presented in this case. As Arkansas itself acknowledges (Rearg. Br. 15), the legal issue decided by the courts below—the retroactivity of *Scheiner*—is distinct from the question whether petitioners have a cause of action for a refund. The federal character of the retroactivity issue is thoroughly discussed in our Reply Brief (at 9-12), and Arkansas, which conceded at the certiorari stage that the issue is one of federal law to be determined under the *Chevron* test (Br. in Opp. 11; see also Am. Br. of California, *et al.*, at 3), makes no serious effort to respond to that argument.

III. EVEN IF THERE WERE NO STATE CAUSE OF ACTION, FEDERAL LAW WOULD REQUIRE A REFUND OF THE TAXES EXACTED BY ARKANSAS IN VIOLATION OF THE COMMERCE CLAUSE

Arkansas advances (Rearg. Br. 5-8) a new argument based on the Eleventh Amendment, contending that the Amendment bars this Court from "subject[ing] Arkansas

elsewhere explicitly acknowledged that "a refund of illegally exacted taxes is an appropriate remedy in an illegal exaction suit." See Defs.' Br. on Remedies, *Brunner and Lay, Inc.* v. *Pledger*, No. 86-4305 (Chancery Ct. Pulaski Cty.), at 1 (filed April 18, 1989).

In any event, Arkansas' attempt to show (Rearg. Br. 13-14 n.12) that sovereign immunity bars a refund action falls far short of the mark. Because the Arkansas Constitution itself creates the tax refund remedy (see Art. 16, § 13)—much like the Takings Clause of the United States Constitution creates the just compensation remedy—the general recognition of state sovereign immunity in the same document is not significant. Cf. *Jacobs* v. *United States*, 290 U.S. 13 (1933) (waiver of federal sovereign immunity not necessary to allow recovery under constitutionally-required just compensation remedy). And the existence of the Arkansas Claims Commission is irrelevant here. Not only is the Commission's authority limited to recommending refunds to the legislature, but it disclaims any power even to consider constitutional claims such as those presented in this case. *Arkansas State Claims Commission Rules and Regulations* at 4 (July 1989).

to monetary liability by declaring that the rule of *Scheiner* governs not only the future, but the past" (Rearg. Br. 8). This contention appears related to the position urged in the NCSL amicus brief on reargument in *McKesson*—that the states' sovereign immunity bars this Court from recognizing a right to monetary relief against a state in its own courts, even if that claim is grounded in the Constitution, even if the Constitution would entitle the plaintiff to monetary relief against a city or a county, and even if sovereign immunity considerations played no role in the state court decision denying the refund.

As noted previously, because of the existence of a state law refund remedy, this case does not require consideration of the extent to which federal law may require refunds of taxes exacted in violation of the Commerce Clause—a subject that we have discussed in our amicus brief in *McKesson*. Nevertheless, both Arkansas and NCSL continue to place so much emphasis on that issue that we must briefly respond to their latest arguments on the point.

A. Neither The Eleventh Amendment Nor State Sovereign Immunity Authorizes A State Court To Decline To Enforce A Remedy Mandated By The Constitution.

1. Arkansas contends (Rearg. Br. 5-8) that the Eleventh Amendment bars this Court from holding that the Constitution ever requires a state to disgorge taxes collected in violation of the Commerce Clause. The argument appears to proceed in the following steps: (1) this Court's power to abrogate the states' Eleventh Amendment immunity is no greater than that of Congress; (2) Congress can abrogate the states' Eleventh Amendment immunity only on a prospective basis, subjecting them to liability for conduct after the date of enactment of the federal statute; (3) retroactive application of *Scheiner* would "subject the affected States to monetary liability without any prior warning" (*id.* at 7); and (4) because Congress could not subject the states to such

retrospective liability, this Court cannot do so by holding *Scheiner* retroactive. This syllogism is rife with errors.

First, the Eleventh Amendment has nothing at all to do with the question whether the Constitution itself provides a remedy, cognizable in state courts, for refunds of taxes exacted in violation of the Commerce Clause. The Amendment limits the *forum* in which a state may be sued, barring the initiation of certain types of suits in federal court. It does not embody some over-arching principle that also insulates states against federal law claims asserted in *state* court. *Nevada* v. *Hall*, 440 U.S. 410, 419-421 (1979); *Employees* v. *Missouri Dep't of Public Health & Welfare*, 411 U.S. 279, 288-298 (1973) (Marshall, J., concurring); see also *Maine* v. *Thiboutot*, 448 U.S. 1, 9 n.7 (1980). Because both this action and *McKesson* come from state courts, the Eleventh Amendment cannot insulate the states from a remedy required by the Constitution.

A second flaw in Arkansas' argument is its erroneous assumption—unsupported by any citation of authority—that the Eleventh Amendment prevents Congress from subjecting the states to monetary liability for acts performed prior to the adoption of a statute waiving the states' Eleventh Amendment immunity. This Court rejected precisely that argument when Arkansas advanced it in *Hutto* v. *Finney*, 437 U.S. 678, 694 n.23 (1978), holding that a state could be required to pay attorneys' fees under 42 U.S.C. § 1988 in lawsuits commenced *before* the enactment of that statute. Indeed, while Arkansas relies heavily on *Union Gas* in this part of its argument, it ignores the fact that the conduct for which Pennsylvania was sued in that very case took place long before the enactment of the federal statute abrogating the states' immunity. See 109 S. Ct. at 2276-2277.

In sum, the states do not need notice that particular conduct will subject them to monetary liability before either an act of Congress or the Constitution may require

them to make monetary amends to those they injure through violations of federal law.

2. NCSL's argument invokes the Eleventh Amendment only by analogy: its claim is that state sovereign immunity, only one facet of which is embodied in the Eleventh Amendment, may bar a tax refund remedy otherwise required by the Constitution. Putting to one side the merits of that position, the issue arises only when the tax refund remedy has been refused because of sovereign immunity. That has occurred neither in the present case (see page 5 & n.3, *supra*) nor in *McKesson*. The Florida Supreme Court's opinion plainly does not rest on sovereign immunity: the ground given would apply equally to a non-immune defendant. Moreover, Florida's brief on reargument concedes (at 17; see also *id.* at 6) that the State has waived sovereign immunity for tax refunds—a concession that is compelled by well-established state law. See McKesson Rearg. Rep. Br. 5-6. Thus, the suggestion by NCSL that federal law should recognize a sovereign immunity defense is simply beside the point.[4]

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[4] NCSL asserts (Rearg. Br. 17, 21) that even if the State has waived sovereign immunity, "[c]onsiderations of sovereign immunity" nonetheless "fundamentally bear" on the refund issue, and "the policies that underlie the doctrine" remain in force. This now-you-see-it-now-you-don't approach to sovereign immunity is completely unfounded. There are any number of grounds that a state court might give for denying refund relief that have nothing whatever to do with sovereign immunity. In the *McKesson* case itself, for example, the Florida Supreme Court's reliance on its "pass through" theory does not in any way implicate sovereign immunity; rather, the court was applying what it regarded as general remedial principles, and it unquestionably would have reached the same result if the tax at issue had been imposed by a county or other governmental unit not protected by state sovereign immunity. Amici trivialize the concept of sovereign immunity insofar as they argue that *any* reason for denying relief against a state—even though not resting on sovereign immunity considerations—necessarily involves sovereign immunity simply because the state is the party.

Even if a state did invoke sovereign immunity, it could not thereby avoid a monetary remedy mandated by the Constitution. The question whether state sovereign immunity may trump a remedy provided by federal law is itself an issue of federal law. See *Martinez* v. *California*, 444 U.S. 277, 284 (1980). Nothing in the Constitution or in this Court's decisions supports the broad sovereign immunity principle advanced by NCSL.

First, the rule that NCSL derives from general language in a few old decisions (Rearg. Br. 9)—none of which actually held that sovereign immunity may be invoked to bar a federal claim (see Wolcher, 69 Calif. L. Rev. at 262-265)—is clearly incompatible with modern immunity principles. Far from upholding state immunity in all circumstances, this Court has made clear that a state *can* be haled into court against its will—as NCSL concedes (Rearg. Br. 14), Congress may subject a state to suit in federal court. In addition, the Court has, in a context similar to this one, refused to recognize a broad immunity rule even for state court proceedings. *General Oil Co.* v. *Crain*, 209 U.S. 211 (1908); see also *Testa* v. *Katt*, 330 U.S. 386 (1947); Wolcher, 69 Calif. L. Rev. at 242-243, 266-267.

Second, a critical ingredient of NCSL's argument is its erroneous attempt to equate the states and the federal government. It contends (Rearg. Br. 15-16) that because the Constitution accords sovereign status to each, the sovereign immunity of each is identical. But sovereign immunity rests "'on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.'" *Nevada* v. *Hall*, 440 U.S. at 416 (citation omitted). Because the remedy here is grounded in federal law, the states did not "make[] the law on which the right depends"; the rationale for recognizing sovereign immunity is therefore inapplicable. In our federal system, the states are not sovereign with respect to claims

based on superior federal law. See Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 79-80 (1988); Wolcher, 69 Calif. L. Rev. at 196, 246-248. They therefore may be subjected to the remedies that the Constitution requires for the protection of federal rights.

Third, NCSL's attempt (Rearg. Br. 13-14) to invoke the Eleventh Amendment is no more persuasive than that of Arkansas. As discussed above, that provision has nothing to do with the question whether the Constitution requires that a particular remedy be recognized in actions in state courts. But even if the Eleventh Amendment were relevant, it would not help NCSL's argument. *Union Gas* established that, despite the Eleventh Amendment, the Commerce Clause limits a state's ability to invoke its sovereign immunity to avoid suit in federal court. The plurality concluded that "to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable" (109 S.Ct. at 2284).

The present case follows *a fortiori* from *Union Gas*. For it is not just laws passed by Congress but the negative implications of the Commerce Clause itself that constrain the states in taxing and regulating interstate commerce. When the states, for the good of the Nation as a whole, acceded to this direct constitutional limitation on their sovereign powers of regulation and taxation, they thereby also relinquished their sovereign immunity from suit (which is nowhere mentioned in the Constitution) to the extent necessary to serve the federal interests embodied in the Commerce Clause.

Finally, even if the Constitution could be read to permit the states to assert generally recognized sovereign immunity principles to bar *damages* claims grounded in federal law, that rule would not insulate the states against a constitutional obligation to *disgorge* illegally exacted

taxes in appropriate circumstances. From the earliest days of the Nation, a taxpayer's right to refund relief, through an action against the tax collector (who was then entitled to an indemnity from the government), was well recognized. *Cary* v. *Curtis*, 44 U.S. (3 How.) 236 (1844); Jaffee, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209, 228 (1963). The fact that the appropriate proceeding now takes a different form does not cloak the states with a defense that was historically unavailable in such actions.

In sum, there is no warrant for this Court to endorse the counterintuitive proposition that, even if the Constitution requires a particular remedy in order to protect federal rights, such as disgorgement of taxes collected in violation of the Commerce Clause, the Constitution nonetheless permits the states to immunize themselves against the constitutionally-mandated remedy. States, like county and city governments, are inferior to federal authority and therefore cannot assert sovereign immunity to avoid the commands of the Constitution.[5]

B. The Availability Of The Federal Remedy Should Be Governed By The *Chevron* Standard, Not Some More Restrictive Test.

NCSL asserts (Rearg. Br. 4-5) that, by phrasing the question posed to the *McKesson* parties in terms of a violation of "clearly established law under the Commerce

[5] Arkansas (Rearg. Br. 11) and NCSL (Rearg. Br. 22) also claim that this Court's holding in *Will* v. *Michigan Dep't of State Police*, *supra*, that Congress did not intend to subject the States to liability under Section 1983, supports the view that there is no constitutionally based remedy in the tax refund context. But there is no evidence that, by excluding the states from a statute imposing broad new monetary liabilities for *every* violation of federal law, Congress "meant [Section 1983] to foreclose alternative remedies available to those not covered by the statute" (*Davis* v. *Passman*, 442 U.S. 228, 247 (1979)). "On the contrary, [Section 1983] leaves undisturbed" more particularized remedies available directly under the Constitution. *Ibid.*

Clause," this Court meant to indicate that any federal refund right would be restricted to such cases and would not extend more broadly to other types of cases in which the governing decision would be held retroactive under *Chevron*. It seems unlikely that the Court meant to imply any such limitation, rather than simply to describe the circumstances of the *McKesson* case (which are indistinguishable in this respect from the post-*Scheiner* exactions in the instant case). See ATA *McKesson* Am. Br. 6-7. In any event, the limitation proposed by NCSL is contrary to this Court's decisions.

NCSL contends (Rearg. Br. 5) that it is "inappropriate to use a federal refund remedy against state and local government defendants for the violation of what had been unsettled federal law." But this Court reached exactly the opposite conclusion in *Owen* v. *City of Independence*, 445 U.S. 622, 655 (1980), holding that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated."[6] To the extent any limitation upon the federal refund right is appropriate, the *Chevron* standard, which gives due but not exclusive weight to the novelty of the legal rule in question, best reconciles the relevant interests. See ATA *McKesson* Am. Br. 7.

[6] The Court has utilized the "clearly established law" standard in the context of individual liability, where the need to promote the effective functioning of government requires that individuals be insulated from liability for errors in judgment. See *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). *Owen* recognized, however, that this rationale has no application with respect to governmental liability. See 445 U.S. at 655-656.

IV. THE HUE TAX RESULTED IN ACTUAL DISCRIMINATION AGAINST OUT-OF-STATE CARRIERS

The remainder of Arkansas' brief on reargument (pp. 16-28) consists largely of contentions that, despite its disclaimer (*id.* at 17), cannot be reconciled with this Court's holding in *Scheiner* and that in fact were raised and rejected in that decision. Arkansas' insistent effort to reargue *Scheiner*—a tack also taken in its earlier brief in this case—is inappropriate and simply ignores the retroactivity issue that is now before the Court. Both the incorrectness and the irrelevance of Arkansas' arguments were demonstrated in our previous reply brief (at 12-23), which we here supplement in light of Arkansas' further submission.

Arkansas' principal assertion, which is repeated throughout this part of its brief, is that petitioners are not "victims of discrimination" under the HUE tax. This claim rests on two essential and interrelated premises: (1) that the HUE tax did not disfavor the plaintiff class because the state in which a truck is base-registered is not necessarily the home state of its operator and because not all members of the plaintiff class were in fact injured by the discriminatory feature of the challenged tax; and (2) that *Scheiner* struck down flat taxes solely under the "internal consistency" test and involved no finding that such taxes actually discriminate against interstate commerce.

By this approach, Arkansas attempts to make this case analogous to *McKesson*, in which Florida argues that there was little if any actual injury, and *National Can*, in which (as explained in our opening brief (at 28 n.18, 39)) the invalidated tax presented a hypothetical risk of multiple taxation but in fact had subjected few if any taxpayers to such taxation and thus had not given rise to actual discrimination. The argument is unavailing, however, because it fundamentally misapprehends the governing constitutional principles applied in *Scheiner*.

A. Arkansas' Current Arguments Regarding Discrimination Were Made And Rejected In *Scheiner*.

In *Scheiner*, both Pennsylvania (Br. 2 n.2, 12, 35-36) and Arkansas as *amicus curiae* (Br. 2-4, 10-12) argued that the state of base-registration is easily manipulable, and therefore a showing that a tax disadvantages trucks registered out-of-state does not establish a violation of the Commerce Clause.[7] This Court plainly understood that a classification based on state of registration does not measure with surgical precision the incidence of discrimination produced by flat highway taxes against either interstate commerce or out-of-state truckers, but it nevertheless found such taxes to entail discrimination prohibited by the Commerce Clause. Thus, while the parties had presented the "broad[] * * * constitutional question" whether "flat taxes result in a blanket discrimination against interstate commerce" (483 U.S. at 281), the Court recognized that "[t]he precise issue is * * * more subtle: do the methods by which the flat taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause?" *Id.* at 282.

The Court answered that question in the affirmative, concluding that "the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States" (483 U.S. at 282).[8] And, in language

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[7] Arkansas also advanced the same arguments in its motion to dismiss in *ATA* v. *Gray*, No. 86-358, an earlier phase of the present case that was the companion to *Scheiner*. ATA's reply brief at the jurisdictional stage in *Gray* (at 6-8) contains a further discussion of these issues.

[8] Thus, contrary to Arkansas' submission (Rearg. Br. 20), petitioners' claim would not be impaired even if the sole adverse impact of the HUE tax had been to favor interstate truckers with localized operations (more of whom would obviously be Arkansas-based) over those with more far-flung operations. But in fact the HUE

that dispels any possible uncertainty, *Scheiner* made crystal clear that it is constitutionally immaterial "[w]hether the full brunt, or only a major portion, of the[] burden [of flat taxes] is imposed on the out-of-state carriers" (*id.* at 284); a state's flat highway tax is not rendered any the less discriminatory simply because "some out-of-state carriers which accrue high mileage in [the state] pay the * * * tax at a lower per-mile rate than some [in-state] based carriers" (*id.* at 286). The Court's reasoning thus squarely rejected the argument of Pennsylvania and Arkansas, reiterated here by the latter, that the state of base-registration cannot be used to detect a constitutional violation.

Equally clearly, and contrary to Arkansas' claim (Rearg. Br. 17, 18), the Court held not only that Pennsylvania's flat highway taxes violated the internal consistency requirement but also that they resulted in actual discrimination. See Pet. App. 10a (Blackmun, Circuit Justice). In *Scheiner*, "the cost per mile of each of the flat taxes is approximately five times as high for out-of-state vehicles as for local vehicles" (483 U.S. at 276), and therefore "[i]n practical effect * * * the taxes are plainly discriminatory" (*id.* at 286). See also *id.* at 290 ("Pennsylvania's flat taxes * * * discriminate against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the State"); *id.* at 292 ("blatantly discriminatory consequences"); *id.* at 296 ("unquestionably discriminatory").

In the present case, the actual average discrimination was approximately 3 to 1 (see ATA Rep. Br. 18 n.17; ATA Ark. S. Ct. Br. 347), without even taking into account Arkansas-intrastate operators, who would derive

tax did more than favor local over national interstate truckers. It also favored purely intra-Arkansas carriers (who, of course, drove *all* their miles in Arkansas) over interstate carriers who conducted their operations among the several states. See note 9, *infra*, and accompanying text.

the greatest benefits from the flat feature of the tax.[9] This conclusion was accepted by the Arkansas Supreme Court in invalidating the HUE tax in light of *Scheiner* (see Pet. App. 2a: "It is conceded that the HUE tax effectively costs other truckers more per mile than it costs those based in Arkansas") and by Justice Blackmun in ordering the escrow (*id.* at 11a: The HUE tax has a "discriminatory impact" that is inherent in "the structure of the tax"). The findings of actual discrimination in *Scheiner* and in this case are of course based on the *average* impact of the taxes on truckers, and Arkansas now rails against use of averages (Rearg. Br. 23), but in light of both common sense and the analysis employed by this Court in *Scheiner*, that objection is plainly untenable.[10]

B. The Fact That Class Members' Refund Rights May Vary Depending On The Existence And Extent Of Their Actual Injury Is No Reason To Withhold Ruling On The Retroactivity Of *Scheiner*.

Against this background, Arkansas' argument boils down to semantics. We readily concede that not all opera-

[9] Arkansas complains (Rearg. Br. 4, 20 n.21) that ATA has not identified particular heavy trucks subject to the HUE tax that were engaged in intra-Arkansas carriage. But, as the State is well aware, the figures in the record were limited to interstate truckers (both Arkansas-registered and non-Arkansas-registered) only because mileage data were not readily available for intra-Arkansas truckers, not because such truckers do not exist. See ATA Rep. Br. 18-19. Contrary to its current position, Arkansas acknowledged in its *amicus* brief in *Scheiner* (at 5) that "there are really three groupings of motor vehicles from which payment is exacted [under the HUE statute]. First, *wholly intrastate Arkansas carriers* with a declared gross weight of over 73,280 that pay * * * a flat $175.00 HUE tax * * *" (emphasis added).

[10] Apart from mileage data relating to operations within Pennsylvania and Arkansas, it must be remembered that five other states also had flat highway taxes. See *Scheiner*, 483 U.S. at 285 n.17. Thus, a nationwide trucker actually had to pay these taxes in seven states—conclusive proof that the taxes operated in practice to penalize interstate commerce.

tors of trucks registered outside Arkansas are entitled by that fact alone to a refund; insofar as their trucks made sufficiently extensive use of Arkansas' highways that they enjoyed a low HUE tax cost per mile (such as the carriers on which Arkansas dwells at length in its brief),[11] they may not be entitled to a refund. By the same token, if any Arkansas-registered trucks engaging in interstate commerce made little use of the State's roads and therefore suffered injury attributable to the interstate character of their operations, they might also have a plausible claim for a refund (though they are not members of the plaintiff class in this lawsuit). Accordingly, Arkansas' position really amounts to a quibble about the adequacy of the terminology "out-of-state trucker" to capture the discriminatory feature of flat taxes that the Commerce Clause prohibits.

For our part, we believe that the phrase "out-of-state trucker" is a useful shorthand to express a concept that, if elaborated in full detail each time it was used, would be cumbersome and unwieldy. Moreover, the state of base-registration is in fact a quite satisfactory first-order proxy for the unconstitutional discrimination that inheres in flat taxes; as the record in this case demonstrates, the overwhelming number (98.4%) of Arkansas-registered heavy trucks elected to pay the flat $175 tax, while the great majority (76.8%) of non-Arkansas-based trucks paid 5¢ per mile and therefore were disadvantaged by the tax. See ATA Ark. S. Ct. Br. 337-338.

Whatever the conceptual imperfections in the phrase "out-of-state trucker," there is no basis whatsoever for Arkansas' claim that it is entitled to keep *all* of the HUE

[11] As Arkansas knows full well, these trucks were base-registered outside the State not so that their operators could join the plaintiff class in this lawsuit but rather to avoid retaliatory taxes passed by a number of states in response to discriminatory flat highway taxes like the Arkansas HUE tax. See J.A. 31; *Scheiner*, 483 U.S. at 285 & n.18.

tax proceeds because no actual discrimination occurred or because the plaintiff class embraces some operators that were not injured by the illegal aspect of the tax.[12] Without question, a substantial number of carriers suffered serious actual discrimination of the very sort that, as the Court held in *Scheiner*, the Commerce Clause condemns. The inherent and undeniable tendency of flat taxes is to benefit those carriers that travel only or predominantly in the state; it hardly should be surprising when that tendency is realized in practice. The logic of *Scheiner* and the record in this case leave no room for doubt that the HUE tax inflicted actual discrimination of a kind that the Constitution forbids. Accordingly, if *Scheiner* is retroactive, petitioners are entitled to pursue their claims for refunds to remedy the actual injury inflicted by the Commerce Clause violation.

C. An Appropriate Refund Remedy Can Be Fashioned To Redress The Actual Discrimination Suffered.

While the fact that the HUE tax had a different impact on different carriers is not material to the retroactivity of *Scheiner* and the existence of *some* refund obligation, it will be relevant to shaping an appropriate remedy if *Scheiner* is held to be retroactive. Arkansas' entire argument on this point (*e.g.*, Rearg. Br. 24-25 & n.31) rests on the mistaken supposition that we are claiming a federal right to full refunds of HUE taxes paid by all members of the plaintiff class. That has never been our position, as we made clear in our opening brief (at 38-40).

The simple fact is that we do not ask the Court to address in any way the question of the amount of refunds

[12] This emphasis on the presence in this case of carriers like Jones Truck Lines seems in large part to be a complaint about the composition of the class that was certified by the Chancery Court back in 1983. But the State never challenged or sought modification of the order defining the class. It is far too late for it to do so now.

due. The precise implementation of the refund remedy may be left in the first instance to the state courts on remand from this Court. Any disputes about which truckers have actually suffered discrimination can be resolved at that stage, and therefore Arkansas' contentions, insofar as they bear on the scope of the relief available, are at best premature. But because these contentions reflect a manifest misunderstanding of the controlling considerations, we briefly outline our position for the Court.

As *Scheiner* recognized, the central vice in flat highway taxes is that they penalize carriers (wherever registered) that engage in extensive interstate transportation rather than confining their operations to one or a few states. A national carrier will pay much more in flat highway taxes than an intrastate or regional carrier that travels the same total number of miles (and thus causes the same wear and tear to the highways) but concentrates its mileage in a single state or a small number of states. Such at system is incompatible with the core policy of the Commerce Clause, which requires that "state boundaries [be] economically irrelevant" and "a neutral factor in economic decisionmaking" (*Scheiner*, 483 U.S. at 283). Under this standard, it is the place of operation—not the place of registration—that is constitutionally determinative.[13]

[13] It is for this reason that the two taxes that respondent relies on (Rearg. Br. 25-26 & n.34) as analogous to the HUE tax are in reality quite different and completely beside the point here. Registration fees are subject either to apportionment under the International Registration Plan (IRP) or reciprocity (see *Scheiner*, 483 U.S. at 272 & n.7), and hence the fact that a trucker conducts its operations in more then one state does not affect its tax liability. The Court in *Scheiner* specifically concluded that registration fees do not violate the Commerce Clause because "a vehicle may pass among the States as freely as it may roam the State in which it is based" and therefore "state boundaries are economically irrelevant" (*id.* at 283). The same is true for a *federal* flat highway tax, since by definition only a single sovereign can impose such a tax. See ATA *Scheiner* Br. 48-49 and ATA *Scheiner* Rep. Br. 9 (discussing the federal tax in *Massachusetts* v. *United States*, 435 U.S. 444 (1978)).

Against this background, a court that had determined that refund relief was appropriate in this case might adopt any one of several options. First, it could order a full refund; we have never suggested that federal law would require such relief, merely that state law may do so.[14] Second, it could order refunds in such amount as it determined to be necessary to restore members of the plaintiff class retrospectively to equal treatment with beneficiaries of the flat tax. Fuel use tax returns and HUE tax returns show the number of Arkansas miles operated by each interstate carrier, from which its per-mile HUE tax cost is readily calculable. The record in this case contains a survey that reflects the average HUE tax cost for Arkansas-based operators. Each carrier could receive a refund in the amount of the excess it paid above the average cost for in-state truckers.

Finally, a court might conclude that the refund should be confined to the amount paid by any carrier in excess of what it would have paid under a nondiscriminatory tax raising the same amount of revenue. The latter figure could be calculated by estimating the total number of miles driven by all heavy trucks and dividing that figure into total HUE tax revenues; the quotient would be the average rate per mile that would have had to be charged if there had been no $175 cap. While the total mileage figure is not readily available because intrastate trucks did not need to report actual mileage, it would be well within the traditional powers of a court to find that amount with the aid of evidence adduced by the parties.

[14] At least in the case of a user tax such as is at issue here, even a full refund should not be unduly burdensome in light of the state's ability to finance the refund through new (but nondiscriminatory) taxes imposed on the same users of the state-provided facility.

Here, such a calculation might not even be needed, since we know that the replacement tax adopted by the Arkansas General Assembly—which is designed to raise the same amount of revenue from the same class of taxpayers, but without a flat cap—employs a rate of 2.5¢ per mile. A court following this third method of calculating refunds could simply order return of any amount paid in excess of 2.5¢ per mile. True, this method would not fully redress the past discrimination (and might for that reason be determined in *McKesson* to be legally inadequate), but it would at least restore the amount that was improperly shifted from local to interstate carriers. While this effort to formulate an equitable refund criterion is ridiculed by Arkansas (Rearg. Br. 19 n.20) on the ground that exact calculation may not be possible, it is manifestly fairer than the State's position than nothing should be repaid even to those who undeniably suffered significant injury from the State's constitutional violation.

It is of course unnecessary for this Court to choose at this juncture among these (or any other) remedial standards. What should be clear, however, is that, contrary to Arkansas' assertion (Rearg. Br. 27-28), a reasonable refund remedy would not interfere with the State's current highway program or relieve interstate carriers of paying their fair share of highway taxes. We have outlined (Br. 37-38; Rep. Br. 22-23) a number of ways in which Arkansas can ameliorate the impact of refunds on its treasury, including issuing long-term bonds to finance the refunds, stretching out payment of refunds over a reasonable period of time, and increasing nondiscriminatory highway taxes such as the fuel tax. In essence, the State would serve merely as a conduit for the reimbursement of truckers that suffered actual discrimination as a result of the HUE tax.

Nor would appropriately measured refunds constitute any sort of windfall to the discriminated-against class;

Arkansas' assertion to this effect not only is baseless but wholly fails to explain why heavy interstate trucks should have been made to pay a greater highway use fee than that paid by their in-state counterparts that weighed exactly the same amount, traveled exactly the same total mileage, and caused exactly the same wear and tear to our Nation's roadways.

In the end, the strenuous efforts to avoid review by this Court of the erroneous ruling by the Arkansas Supreme Court on the retroactivity of *Scheiner* are unavailing. This Court should hold that the Commerce Clause principles applied in *Scheiner* also govern petitioners' claim for refunds of HUE taxes imposed since the beginning of this litigation, and especially those exacted for operations conducted *after* the decision in *Scheiner*.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-325

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents.

On Writ Of Certiorari To The Arkansas Supreme Court

RESPONDENTS' MOTION FOR LEAVE TO FILE A BRIEF ON REARGUMENT

Respondents hereby move for leave to file the attached Brief on Reargument. This case was argued on March 22, 1989. On July 3, 1989, the Court restored the case to the Calendar for reargument, which is now set for December 6, 1989.

In the past, parties in cases set for reargument have been permitted to file additional briefs; some have sought and been granted leave to do so. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 276-77, 575 (6th ed. 1986). The Court's Rules do not appear to address the

situation. Our Brief on Reargument in this case should, we believe, be accepted because it discusses a number of post-argument developments (*cf.* Supreme Court Rule 35.5) and seeks to clarify our position in this rather complex case prior to reargument.

We have contended that the Court does not have the power, in light of the Eleventh Amendment, to subject Arkansas to a retroactive monetary award in a case arising under the Commerce Clause. Late in the Term, the Court handed down several decisions concerning the Eleventh Amendment and Congress' power to expose the States to monetary liability. *Pennsylvania* v. *Union Gas Co.*, 109 S.Ct. 2273 (1989); *Hoffman* v. *Conn. Dep't of Income Maintenance*, 109 S.Ct. 2818 (1989); *Dellmuth* v. *Muth*, 109 S.Ct. 2397 (1989); *Will* v. *Michigan Department of State Police*, 109 S.Ct. 2304 (1989). In addition, the Court reaffirmed the rule of *Hans* v. *Louisiana*, 134 U.S. 1 (1890), which petitioners opposed. *Dellmuth* v. *Muth*, 109 S.Ct. at 2401 n.2. These cases, and particularly the opinions in *Union Gas*, which concerned Congress' authority under the Commerce Clause, lend further support to our position, as the Brief on Reargument explains.

Several other decisions handed down by the Court after oral argument are also significant to this case and are discussed in the Brief on Reargument. Because the nature of the constitutional violation affects whether a particular remedy is warranted, it is critical to identify with precision why the HUE tax was invalid. *Healy* v. *Beer Institute, Inc.*, 109 S.Ct. 2491 (1989), and *Amerada Hess Corp.* v. *Director, Div. of Taxation*, 109 S.Ct. 1617 (1989), both of which were decided under the Commerce Clause, assist in this regard. Also, in *Quinn* v. *Millsap*, 109 S.Ct. 2324 (1989), the Court made clear that its power to decide whether a State has violated the Constitution is

not coextensive with its power to order a particular remedy for that violation.

In addition, the oral argument in this case has suggested to respondents additional arguments and the need to sharpen and amplify the arguments we have made. This, we believe, is better accomplished in writing in light of the complexity of the underlying facts of this case. The Brief on Reargument therefore discusses why, in light of *Healy, Amerada Hess* and *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), petitioners were not "victims of discrimination" in the sense they have claimed and why granting them a monetary award would not restore interstate commerce to a plane of equality with intrastate commerce.

The Brief on Reargument also answers contentions petitioners raised in their reply brief, at oral argument and in their *amicus* brief in the companion case. In light of the factual intricacies in this case, these arguments cannot be readily answered except in writing. We have filed but one brief in this case. On the other hand, petitioners have filed a 49-page opening brief, an over-sized reply brief consisting of 25 pages of text and a three page "appendix" citing cases, and a 30-page *amicus* brief in *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco, Dept. of Business Regulation of Florida*, No. 88-102, Oct. Term 1989, replete with arguments about this case with which we strongly disagree.

For the foregoing reasons, respondents respectfully

request that the Court grant them leave to file the attached Brief on Reargument.

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Respondents.

On Writ Of Certiorari To The Arkansas Supreme Court

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Respondents.

On Writ Of Certiorari To The Arkansas Supreme Court

RESPONDENTS' BRIEF ON REARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

In the exercise of its power to regulate interstate commerce Congress could have banned all flat State taxes on heavy trucks. Given this Court's decision in *Pennsylvania v. Union Gas Co.*, there is now little doubt that despite the Eleventh Amendment, Congress would have the power to subject the States to monetary liability for violating such a ban. There is, however, an important constraint on such exercises of congressional power. The Court has recognized that legislation rendering the States liable to pay monetary awards upsets the tradi-

tional balance between State and federal governments. Congress therefore cannot impose liability on State governments *unless* its intentions are clearly set forth in the text of the legislation. This clear statement requirement ensures not only that Congress has acted deliberately, but also that the States have been put on notice of potential liability in the future.

By relying on the fiction that *American Trucking Ass'ns, Inc.* v. *Scheiner* has always been the law—which is to say that the rule of *Scheiner* applies retroactively, petitioners would have the Court subject Arkansas to monetary liability without any advance notice. That would place the Court, in cases arising under the Commerce Clause, in the position of having greater lawmaking power than Congress. But the Eleventh Amendment was designed to restrain the federal judiciary, and the principles of federalism embodied in that constitutional provision are all the more compelling when Supreme Court adjudication rather than congressional legislation is involved.

Far from respecting the traditional balance between the States and the federal government, petitioners seek to dismantle it. They propose that the Court grant them a monetary remedy in order to deter State legislators from violating the Commerce Clause. State financial concerns, they say, should be disregarded in the interest of forcing elected representatives to toe the line. Petitioners, in short, urge the Court to act in direct contradiction of the Eleventh Amendment and the traditional balance between the States and the federal government.

Even if the Court were to accept petitioners' theory and devise a national law of tax refunds, petitioners still would not be entitled to recover in this case. Petitioners claim

they should be compensated because they were "victims of discrimination." But the constitutional defect in the HUE tax resulted from its potential pressure on interstate carriers to reduce per mile costs by confining their operations to Arkansas. Under the internal consistency test of *Scheiner*, the "victims" of the Arkansas flat tax were therefore those interstate truckers who succumbed to the pressure to conduct their business in the State—in other words, the truckers who ran up the most miles in Arkansas and therefore engaged in the least amount of interstate transportation. But those truckers, who petitioners do not purport to represent, would have had the *lowest* costs per mile, and any unconstitutional injury they suffered could not be measured by the amount of the tax they paid or the costs per mile they incurred.

Petitioners ignore this and persist in trying to squeeze the facts of this case into one or the other of two distinct forms of tax discrimination outlawed by the Commerce Clause. Sometimes they claim discrimination from a tax that favored intrastate commerce over interstate commerce; in their more recent arguments, they claim discrimination from a tax that favored local businesses over foreign businesses. The Arkansas HUE tax did neither.

Petitioners are carriers who decided to base register their heavy trucks in States other than Arkansas. (Carriers have great freedom in determining where to register their trucks.) According to them, they suffered from discrimination because in one year their average costs per mile under the HUE tax (3.2 cents per mile) were more than the average of carriers with heavy trucks registered in Arkansas (1 cent per mile). But every heavy truck making up petitioners' statistical comparison—regardless where the truck was registered—was engaged in interstate transportation, as they now concede. Peti-

tioners have not established any discrimination in favor of intrastate commerce. Indeed, they have been unable to identify the costs per mile of even one intrastate heavy truck that was subject to the HUE tax.

When it comes to the local-foreign form of tax discrimination, petitioners want to be known not simply as interstate truckers, but as out-of-state taxpayers. Some of them doubtless fit that description, but many do not. All of them have in common merely the fact that at some point in this case their trucks did not carry Arkansas plates. But that has nothing to do with discrimination against out-of-state businesses. If, for one moment, these petitioners had truly believed that the advantage under the HUE tax went to trucks registered in Arkansas, they could have easily changed the registration of their fleets and become members of the favored class. In fact the opposite occurred, as so-called Arkansas truckers transformed themselves into out-of-state taxpayers by changing the plates on their vehicles.

Take, for example, Jones Truck Lines (JTL), a lead plaintiff and one of the named petitioners. JTL is a company headquartered in Arkansas which decided after this case began to register its trucks outside the State. According to petitioners' lights, that made JTL an "out-of-state taxpayer," although it was no such thing. The example of JTL is far from isolated. During the course of this litigation more than half of the trucks originally registered in Arkansas switched registration to another State. Their actions show what petitioners obscure—that the State of a carrier's base registration was about as important in terms of HUE tax cost as the color of its trucks and had nothing whatever to do with its status as a local or foreign business.

Moreover, petitioners invoke *averages* to support the notion that they were victims of discrimination. It is simply not true that Arkansas applied one tax rate to trucks with Arkansas plates and a higher rate to trucks with plates from other States. The fact is that even among petitioners there were large disparities in costs per mile under the tax. The same is true with respect to the Arkansas base-registered truckers, half of whom paid more than the average of 1 cent per mile.

When one cuts through all the rhetoric about discrimination, petitioners' complaint reduces to the unremarkable proposition that some truckers paying the $175 yearly fee had lower costs per mile than others. But if such inequalities were to be mended retroactively through a monetary award, it would be of no moment where the truck was base-registered. Petitioners, however, cannot face up to this. If they did so, they would have to concede that their claims have nothing whatever to do with discrimination against out-of-state businesses—as indeed they do not.

Petitioners, in short, are not "victims of discrimination" in any meaningful sense and they do not constitute a class of carriers who felt the unlawful effect of the HUE tax under the Commerce Clause. They are accordingly entitled to no monetary relief from the State of Arkansas.

ARGUMENT

A.

IN LIGHT OF *UNION GAS*, THE COURT MAY NOT IMPOSE RETROACTIVE MONETARY LIABILITY ON THE STATES IN CASES ARISING UNDER THE COMMERCE CLAUSE

In cases arising under the Commerce Clause, this Court has no greater lawmaking power than Congress

when it enacts legislation pursuant to that constitutional provision.[1] In fact, the Court has a good deal less. While Congress can affirmatively regulate interstate commerce, this Court cannot.[2] In light of these principles, *Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273 (1989), decided late in the Term, significantly affects this case.

The plurality opinion in *Union Gas*, representing the views of four Justices, concluded that because the Eleventh Amendment was designed "to rein in the judiciary, not Congress," Congress can abrogate the States' sovereign immunity by exercising its Article I power to regulate commerce among the several States. 109 S. Ct. at 2283 (Justice Brennan, joined by Justices Marshall, Blackmun and Stevens). However, as Justice White indicated in his concurring opinion, and as a majority of the Court agrees, Congress cannot render the States liable to pay monetary judgments unless the text of the statute unmistakably creates this remedy.[3] Justice Scalia's dissenting opinion in *Union Gas*, joined by the Chief Justice and two other Justices, concluded that in light of the Eleventh Amendment, Congress did not have the power to enact legislation pursuant to the Commerce Clause that would subject the States to monetary awards. 109 S. Ct. at 2295 (Justice Scalia, joined in part by the Chief Justice and Justices O'Connor and Kennedy).

[1] *Erie R. R.* v. *Tompkins*, 304 U.S. 64, 78 (1938); Friendly, *In Praise of Erie—and of the New Federal Common Law*, in *Benchmarks* 155, 167 (1967) ("Yet it would be even more unreasonable to suppose that the federal courts have a lawmaking power which the federal legislature does not.").

[2] *See, e.g.*, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) ("the existence of congressional authority under Art. I" does not "mean that federal courts are free to develop a common law to govern those areas until Congress acts").

[3] 109 S.Ct. at 2289 (Justice White, joined in part by the Chief Justice and Justices O'Connor and Kennedy). *Accord*, *Hoffman* v. *Conn. Dep't of Income Maintenance*, 109 S.Ct. 2818, 2822 (1989) (plurality opinion); *Dellmuth* v. *Muth*, 109 S.Ct. 2397, 2401 (1989) ("evidence of congressional intent must be both unequivocal and textual"); *Will* v. *Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989); *Welch* v. *Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 474 (1987) (plurality opinion); *Quern* v. *Jordan*, 440 U.S. 332, 345 (1979) (Congress must "explicitly and by clear language indicate on [the] face [of the statute] an intent to sweep away the immunity of the States"); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985).

A judgment in petitioners' favor in this case would be inconsistent with each of these opinions in *Union Gas*. If, as the plurality in *Union Gas* states, Congress can abolish State sovereign immunity pursuant to the Commerce Clause because the Eleventh Amendment only limits the federal judiciary, the Court itself cannot subject the States to monetary relief in the absence of federal legislation so providing. While Congress' power may not be circumscribed, the power of this Court is.

Justice White stated in his concurring opinion that Congress, in the exercise of its Article I power, can render the States liable only if the text of the legislation unmistakably provides such relief. This "clear statement" rule not only ensures that Congress has acted deliberately, but also gives notice to the States that in the future—prospectively—they may have to pay monetary judgments from their treasuries if they violate the newly-enacted legislation.

In this case, to engage in the fiction that *Scheiner* has always been the law, which is to say that it applies retroactively, would be to subject the affected States to monetary liability without any prior warning. The Court, of course, has never given notice to the States that violations of the Commerce Clause would subject them to monetary liability. But that is not all. Because *Scheiner* overruled several of the Court's longstanding decisions upholding flat highway taxes, the States received no advance notice

that they would even be violating the Commerce Clause if they enacted such taxes.[4] The Court's recent decisions in *Hoffman* v. *Conn. Dep't of Income Maintenance*, 109 S.Ct. at 2822 (plurality opinion); *Dellmuth* v. *Muth*, 109 S. Ct. at 2308; and *Will* v. *Michigan Dept. of State Police*, 109 S.Ct. at 2308, as well as *Union Gas*, would constrain Congress if it sought to achieve such a result. Whatever the theoretical underpinnings of the Court's Commerce Clause decisions, the Court can exercise no greater authority over the States than Congress and therefore cannot subject Arkansas to monetary liability by declaring that the rule of *Scheiner* governs not only the future, but the past.

The four dissenting Justices in *Union Gas* believed that under the Commerce Clause Congress could not subject the States to monetary awards. It follows that the Court, in a case arising under that constitutional provision, could not achieve that end by reading into the negative implications of the clause a power Congress itself did not possess.

B.

THE ELEVENTH AMENDMENT MAY NOT BE DISREGARDED IN THE INTEREST OF DETERRING STATE LEGISLATORS

Petitioners think that the Eleventh Amendment and the "principles of federalism" it reflects[5] are irrelevant because this case is here on writ of certiorari to the

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[4] See our Brief, at 29-32. Shortly before Arkansas enacted its flat tax on heavy trucks, Congress enacted the Surface Transportation Assistance Act of 1982, which increased flat taxes on heavy trucks to a maximum of $1900 per year. See note 34 *infra*.

[5] *Dellmuth* v. *Muth*, 109 S.Ct. at 2400, quoting *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89, 100 (1984); and *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978).

Arkansas Supreme Court. Pet. Reply Br. 1-8. We disagree.

The first reason petitioners offer—that *Hans* v. *Louisiana*, 134 U.S. 1 (1890), is not good law—has been rejected. *Dellmuth* v. *Muth*, 109 S.Ct. at 2401 n.2.

Petitioners' second argument is that the Court has decided some 60 cases on review from State courts where the Eleventh Amendment might have been raised. Pet. Reply Br. 2-5, App. 1a-3a. These citations, many of which were drawn from a law review article,[6] "do not stand for the proposition that the Court has developed a different rule of state immunity [under the Eleventh Amendment] in appellate, as opposed to original, court cases." Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 Harv. L. Rev. 1372, 1385 n.78 (1989). The question presented here was not before the Court in these earlier cases. *See Will* v. *Michigan Dep't of State Police*, 109 S.Ct. at 2307 n. 4.[7]

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[6] Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1 (1988).

[7] Petitioners concede that "[i]t apparently was not argued in any of these cases that the Eleventh Amendment circumscribed this Court's appellate jurisdiction." Pet. Reply Br. 4-5. *See Patsy* v. *Board of Regents*, 457 U.S. 496, 515-16 n.19 (1982) (Court will not dismiss *sua sponte* on Eleventh Amendment grounds not raised by the parties). Indeed, the oldest decision cited by petitioners (Pet. Reply Brief 3a) makes clear that if the parties do not object to the form of the remedy in a tax case on review from a State court, this Court will assume the remedy is proper under State law. *State Tonnage Cases*, 79 U.S. (12 Wall.) 221, 223 (1871) (recognizing that "[d]ifferent remedies are accorded to a complaining party in different jurisdictions" when state taxes are challenged).

Most of the cases cited in the Appendix to petitioners' reply brief are also distinguishable in other respects. In many of the cases, the

As to our argument that the text of the Eleventh Amendment applies to this case, as it plainly does,[8] petitioners respond that in the past the Court has shown a "willingness to depart from the literal language in construing that provision." Pet. Reply Br. 5 n.7. The answer is useless. Federal courts are not free to disregard the positive commands of the Eleventh Amendment simply

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state taxes were paid under "protest," and recovery of the tax payments was sought through a refund procedure established by State law. *E.g.*, *Norfolk & Western Railway Co.* v. *State of North Carolina ex rel. Maxwell*, 297 U.S. 682, 683 (1936); *MacAllen Co.* v. *Massachusetts*, 279 U.S. 620, 624 (1929). In other cases the refund issue was mooted because the State tax was upheld as lawful. *E.g.*, *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159 (1983); *Pacific Co.* v. *Johnson*, 285 U.S. 480 (1932). In several recent cases, the question of "remedy" was expressly left for decision on remand to the State courts. *E.g.*, *Williams* v. *Vermont*, 468 U.S. 263, 277 (1984). And in at least one case petitioners cite, it is unclear whether a refund was even sought as a remedy. *E.g.*, *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 109 S.Ct. 278 (1988) (challenge to State determination that company's tax payment was deficient in amount).

[8] Since the Eleventh Amendment restricts "the Judicial Power of the United States" it fully applies not only to the lower federal courts but also to this Court; no exception is made for the Court's appellate jurisdiction. See our opening Brief, at 16-19; Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 32-39 (1988).

Moreover, there is no doubt that Congress could subject State court decisions to review in the courts of appeals or in a national court of appeals. See Friendly, *Benchmarks*, *supra*, at 194 & n. 197 ("Existence of such power, noted in *The Federalist* No. 82 (Hamilton), seems beyond doubt."). Petitioners' submission, which seeks to carve out an exception for this Court's appellate jurisdiction under Article III, leads to the untenable result that the Eleventh Amendment would restrict a federal court of appeals reviewing a state court judgment but would not apply when the same case eventually reached this Court.

because petitioners think this would advance the negative implications of the Commerce Clause.

Moreover, when the Court has construed the Eleventh Amendment, it has done so generously in light of the important policies it promotes. The Amendment preserves "the fundamental constitutional balance between the Federal Government and the States," *Atascadero State Hospital* v. *Scanlon*, 473 U.S. at 238, as the Court reiterated last Term, *Dellmuth* v. *Muth*, 109 S.Ct. at 2401; *Will* v. *Michigan Department of State Police*, 109 S.Ct. at 2308. It accomplishes this end by preventing the federal judiciary from imposing monetary burdens on the States for conduct in the past (see our opening Brief, at 15-23). These policies fully apply regardless whether the case is in a lower federal court or in this federal Court.

Furthermore, in *Will* the Court held that States cannot be sued under 42 U.S.C. § 1983 in State courts. *Will* recognizes that the federal-State balance preserved in the Eleventh Amendment would be upset if Congress sought to subject States to monetary liability in State court actions. The same would be true if, instead of Congress, this Court did so by creating a federal law of tax refunds binding on the State courts in cases arising under the Commerce Clause.

Petitioners protest that if the Eleventh Amendment applied in this Court, the supremacy of federal law would be undermined. Pet. Reply Br. 7. This assumes the point at issue. The Eleventh Amendment is supreme federal law. Petitioners also ignore the distinction, recognized last Term in *Quinn* v. *Millsap*, 109 S.Ct. 2324, 2330 (1989), between the Court's power to order a particular remedy for a constitutional violation and its power to adjudicate whether a constitutional violation has

occurred. In light of the Eleventh Amendment, the distinction is vital. *Green* v. *Mansour*, 474 U.S. 64, 68 (1985), carefully differentiated, for purposes of the Eleventh Amendment, between "[r]emedies designed to end a continuing violation of federal law . . . necessary to vindicate the federal interest in assuring the supremacy of that law" and remedies—such as the ones petitioner propose—serving only "compensatory or deterrence interests."[9]

Petitioners' contentions, if adopted, would strike at the heart of the Eleventh Amendment. They say the Court should order retroactive monetary relief because the States need to be disciplined.[10] The Court, in their view, should control the "impulse[s]" of "state legislators" and deter these elected officials from violating the Commerce Clause. Pet. Brief 30. In performing this function, the Court should not be "solicitous of a state's financial concerns." *Amicus* Brief 23. Petitioners, in short, invite this Court to make a shambles of the constitutional balance of power between the States and the federal government, a balance of power the Eleventh Amendment was intended to preserve. *Atascadero*, 473 U.S. at 242.

To make matters worse, they ask this of the Court without any factual predicate. The Arkansas legislature

[9] The supremacy and uniformity of federal law are protected even though the Eleventh Amendment bars the Court from subjecting the States to retroactive monetary liability. For the reasons discussed in our opening Brief (at 20-21), the Eleventh Amendment does not apply to injunctive actions and does not restrict the power of this Court, on review of State court judgments, to determine whether a State law violates the Commerce Clause.

[10] *See, e.g.*, Pet. Brief 30-33; Pet. Reply Brief 16-17; Brief for American Trucking Associations, Inc., *et al.*, as *Amici Curiae* in support of petitioner 18-21, 23, in *McKesson Corp.* v. *Div. of Alcoholic Beverages and Tobacco*, No. 88-192, Oct. Term. 1989 (hereafter *Amicus* Brief.).

of 1983, which enacted the HUE tax, did not flout the Constitution. At the time, the outstanding decisions of this Court had sustained similar taxes and Congress, exercising its power under the Commerce Clause, had also imposed a flat tax on heavy trucks.[11] In the face of this, petitioners retreat to "the generality of situations," where State legislatures supposedly enact tax statutes in violation of the Commerce Clause. *Amicus* Brief, 20; Pet. Reply Brief 17. One is left to wonder how petitioners will prove this assertion if they ever make the attempt. We are aware of no survey showing to what extent State legislatures have intentionally violated the Commerce Clause and, petitioners' intuition to the contrary notwithstanding, it does not seem to us the elected representatives of the people tend to disregard the decisions of this Court. They, like their federal counterparts, take seriously their oath under Article VI to support the Constitution.

C.

PETITIONERS' CLAIM FOR RELIEF NECESSARILY RESTS ON FEDERAL LAW

Petitioners cannot avoid the consequences of *Union Gas* and the other decisions we have discussed by invoking some alleged State law cause of action.[12] Regardless of

[11] See our opening Brief, at 29-32; and n.34 *infra*.

[12] At oral argument, petitioners claimed that because the Arkansas Supreme Court awarded refunds of the *escrowed* taxes, this proved the State had no sovereign immunity with respect to refunds of taxes deposited in the State treasury. Tr. of Oral Argument 9. That is not correct. Earlier in this case petitioners fully understood that under Arkansas law, immunity attaches once the proceeds of the tax have been deposited in the treasury. See our opening Brief, at 14 n.4. Funds held in escrow are not in that category. *Cf. Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (plurality opin-

what label petitioners place on it, their ultimate contention necessarily is that under *federal law* they *should* recover a monetary award against the State.[13] This is why

ion) (no sovereign immunity when property is in the hands of State officers).

The State's immunity rests not only on the provision in the Arkansas Constitution forbidding suits against the State without its consent. It is also based on the State constitutional provision forbidding money to be drawn from the treasury except by legislative appropriation. Ark. Const. Art. 16 § 12. A similar provision in the United States Constitution (Art. I, § 9, cl. 7) supports the sovereign immunity of the United States. *United States* v. *Testan*, 424 U.S. 392, 399-402 (1976); *Pennsylvania* v. *Union Gas Co.*, 109 S.Ct. at 2298 (Scalia, J., dissenting).

In State court, petitioners therefore agreed—as they said "everyone" did—"that the only appeal or recovery of these funds once they had been deposited into the Treasury of the State probably lies with the Arkansas State Claims Commission." R. 670-71. The Claims Commission was created in order to provide an avenue for relief "while maintaining the State's sovereign immunity." Pltffs.' Ex. 12, R. 2587, at p. 3. The Claims Commission has "exclusive jurisdiction" over claims for tax refunds against the State and the "State Highway-Transportation Department." *Id.* at 4. "Non-controversial claims . . . for refund of taxes . . . receive immediate payment not to exceed $1,000.00." *Id.* at 5. Other claims for tax refunds must be approved by the Commission, which follows detailed adjudicatory procedures in making its determinations. *Id.* at 8-16. If the Commission approves the claim, the claim is submitted to the Arkansas General Assembly "for its approval and subsequent appropriation of funds before payment can be rendered." *Id.* at 5. (All of this further refutes petitioners' mistaken idea that, as a matter of State law, Arkansas cannot assert sovereign immunity in defense of actions for tax refunds.)

[13] Otherwise, this Court would not have jurisdiction under 28 U.S.C. § 1257. See also the Rules of Decision Act, 28 U.S.C. § 1652.

Why retroactivity in this context is a question of federal law petitioners do not explain. In other State court cases involving facts similar to this case, the question of retroactivity (as well as the question of monetary recovery) has been treated as a state law issue.

they claim that a monetary remedy is "federally-compelled" (Pet. Brief 28). It matters little whether they bring the Commerce Clause in through the back door by framing their arguments in terms of a federal law of retroactivity or whether they rely directly on the Commerce Clause, as they do in their *amicus* brief. The constraints on this Court are not dependent on how petitioners choose to characterize their contentions. In any event, the arguments produced in their *amicus* brief differ little from the arguments produced here under the heading of retroactivity, although the former are more lavishly decorated.[14] It is apparent that in order to prevail, petitioners must persuade the Court to devise a national law governing monetary remedies when State tax statutes are found to have violated the Commerce Clause. Having *Scheiner* declared retroactive may remove one barrier to their recovery, but it does not entitle them to relief and it certainly does not lead to the conclusion petitioners urge upon the Court—that there should be a "federally-compelled refund remedy" requir-

See American Trucking Ass'ns v. *Conway*, No. 88-156, Supreme Court of Vermont, slip op. 9 (Aug. 25, 1989) (applying the "standards enunciated in *Solomon* v. *Atlantis Development, Inc.*, 145 Vt. 70, 74, 483 A.2d 253, 256 (1984)"); *James B. Beam Distilling Co.* v. *Georgia*, 382 S.E. 2d 95 (Ga. 1989).

[14] In their Brief in this case (at p. 27), petitioners argue that they should recover a monetary award because a ruling in their favor would "promote Commerce Clause values." Those values are deterring State legislatures from violating the Constitution and undoing discrimination by granting retroactive compensation. Pet. Brief at 10-11, 27, 30-31. Their *amicus* brief contains the same arguments, embellished with "intermediate points along the spectrum" and with scales calibrated to balance costs to the States against deterrent effects on their elected representatives. *Amicus* Brief, at 18, 23, 27, 28.

ing Arkansas to compensate them for the alleged "unconstitutional discrimination that petitioners suffered on account of the HUE tax." Pet. Brief, at 28, 38.[15]

D.

PETITIONERS ARE NOT "VICTIMS OF DISCRIMINATION" ENTITLED TO MONETARY RELIEF

Although, as we have argued, the Commerce Clause does not confer upon the Court the power to devise retroactive monetary remedies against the States, our objection does not rest on that ground alone. Whether a particular monetary remedy should be created also depends on whether that remedy accomplishes the purpose for which it is proposed. Here it does not. In view of the oral argument in this case and decisions of the Court later in the Term, it is appropriate to provide a more detailed explanation of why this is so.

As a class consisting of all non-Arkansas base registered carriers who paid the HUE tax (*see* note 27 *infra*), petitioners seek recovery on the ground that they were "victims of discrimination." But they are far from precise about what they mean by this. Their arguments have shifted between two distinct forms of unlawful tax discrimination in cases arising under the Commerce Clause. The first occurs when a State tax favors intrastate commerce over interstate commerce. The second takes place when a State tax treats similar interstate transactions differently by "favor[ing] local enterprises at the expense of out-of-state businesses" (*Boston Stock Exchange* v.

[15] According to petitioners, "federal law requires" at a minimum "a refund of such amount as is necessary to undo the unconstitutional discrimination that petitioners suffered on account of the HUE tax." Pet. Brief 38.

State Tax Comm'n, 429 U.S. 318, 329 (1977)).[16] Petitioners sometimes argue that the HUE tax fell into the former category; more often they argue it fell into the latter. *E.g. Amicus* Brief, at 6, 20, 29. As we will explain in a moment, the fact is the HUE tax gave rise to neither form of discrimination.

At oral argument we were asked whether our position in this regard meant that the HUE tax was not unconstitutional despite *Scheiner*. We answered no, explaining that the HUE tax was invalid for a separate reason—namely, its failure to pass *Scheiner's* internal consistency test.[17] This is vitally important because "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974). If, as we will show, petitioners have misidentified the nature of the constitutional violation here, their arguments for a monetary award must fail.

In *Healy* v. *Beer Institute, Inc.*, 109 S.Ct. 2491, 2499 (1989), the Court explained that to determine the validity of a State statute under the Commerce Clause, "the practical effect of the statute must be evaluated . . . by considering . . . what effect would arise if not one, but many or every State adopted similar legislation." It was such an evaluation that spelled the doom of the Arkansas HUE tax in view of the Court's decision in *Scheiner*. If every State imposed a $175 yearly tax on heavy trucks, interstate commerce would be deterred. In order to control costs, interstate carriers would seek to restrict the number of States they entered. In *Amerada Hess Corp.* v. *Director, Div. of Taxation*, 109 S. Ct. 1617, 1623 (1989),

[16] *See Brown-Forman Distillers* v. *N.Y. Liquor Authority*, 476 U.S. 573, 579 (1986).

[17] Tr. of Oral Argument, at pp. 47-49.

the Court made the point succinctly. Because the axle tax in *Scheiner* "applied to both in-state and out-of-state trucks," it was not facially discriminatory. But the tax "nonetheless had a discriminatory effect by exerting 'an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States'" (quoting *Scheiner*, 483 U.S. at 286-87).

In view of these decisions and *Scheiner*, the so-called "victims" of the HUE tax could not have been petitioners, who claim to have travelled the fewest miles in Arkansas.[18] Whatever pressure the HUE tax exerted, petitioners clearly did not feel it. The "victims" were instead the interstate businesses who succumbed to the pressure to "ply their trade" within Arkansas. In other words, those who could have suffered from the unconstitutional effect of the flat tax were the interstate carriers who logged most of their miles in Arkansas and thus engaged in the least amount of interstate transportation. But those carriers necessarily had the *lowest* costs per mile in terms of that tax and petitioners do not purport to represent them.

Petitioners ignore the internal consistency test. According to them, the problem with the HUE tax was that it discriminated. At various points, petitioners describe this discrimination as against interstate commerce and in favor of intrastate commerce. To support this, they rely on statistics showing that Arkansas base-registered carriers paid, on average, $.01 per mile under the HUE tax, while non-Arkansas base-registered car-

[18] Petitioners purport to be a group of interstate carriers who, on average, logged relatively few miles on Arkansas's highways. *But see* pp. 23-24 *infra*.

riers—that is, petitioners—paid, on average, $.032 per mile during one tax year. This leads them to contend that in order to put interstate commerce back on a plane of equality with intrastate commerce,[19] the State must be ordered to pay them back the difference, or in their words, the "discriminatory component."[20]

[19] Pet. Brief 9, 28; Pet. Reply Brief 16.

[20] To complicate matters, petitioners' *amicus* brief in the companion case contains a different version of what federal law requires in the way of retroactive monetary relief against the States for Commerce Clause violations.

Now the idea is that "[a]ny taxpayer victimized by unconstitutional discrimination" should recover an amount "determined by computing how much the taxpayer would have paid if the state had raised the same amount of money through a nondiscriminatory tax." *Amicus* Brief, at p. 29 n. 13. This opens up an entirely new can of worms.

How in the world can it be determined what someone would have paid under some constitutionally-valid tax system that never existed? Petitioners' unstated premise is that States have only two systems of taxation to choose from—one constitutional and other unconstitutional. The premise is false. Take highway taxes for example. Instead of a flat tax on heavy trucks, a State might have raised the needed funds by increasing its registration fees for such trucks. Or it might have increased its fuel taxes. Or it might have imposed per mile charges increasing as the weight of the truck increased. An 80,000 pound truck could be charged, for example, 5 cents per mile while a 73,280 pound truck could be charged 3 cents per mile. Or a State might have imposed per mile charges on the basis of weight and vehicle configuration. ("Vehicle configuration is an important determinant of highway cost responsibility; two vehicles with the same gross weight but different configurations may have significantly different highway cost responsibilities because axle loads are distributed differently." U.S. Dep't of Transportation, *The Feasibility of a National Weight-Distance Tax* II-13 (Report of the Secretary of Transportation, December 1988) (hereafter *Report of the Secretary of Transportation*.)

Any one of these tax systems, singularly or in combination, would be constitutional. Each would lead to a different result under petitioners' theory.

Petitioners are mixing apples and bricks. The supposed 3:1 "disparity" constituting discrimination against interstate commerce and in favor of intrastate commerce (Pet. Brief 28 n.18) does not exist. Petitioners' numbers merely compare the average costs of one group of *interstate* carriers—those with trucks base registered in Arkansas—with another group of *interstate* carriers—those with trucks base registered elsewhere. They have now admitted as much.[21] Ordering Arkansas to pay petitioners any sum of money would not put interstate commerce back on a plane of equality with intrastate commerce because they were not on an unequal plane in the first place.

Petitioners also suggest that the HUE tax discriminated against them in a different way by placing greater burdens on those outside the State while giving an advantage to local businesses. They inject this notion into the case by describing themselves as "out-of-state truckers"

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[21] Pet. Reply Brief 18. Without any factual support, petitioners insist there must have been some intrastate trucks in Arkansas weighing over 73,280 pounds because—as if this supports their assertion—a federal agency has used, for comparison's sake, the figure of 70,000 miles per year when it examined taxes on heavy trucks. *Id.* at 19 n.19. (The agency itself has warned that it is not claiming these mileage figures represent "common or average vehicles." J.A. 134.)

Petitioners make two other unsupported assumptions in this regard. First, they assume that if there were an intrastate truck subject to the HUE tax, that truck must have been in someone else's fleet rather than their own. There is no reason why this would necessarily be so, particularly since many petitioners are in fact Arkansas companies. Second, petitioners assume that if there were such an intrastate truck it must have had a lower cost per mile than their average 3.2 cents. (Otherwise they could not claim discrimination.) But as petitioners' evidence showed, even among interstate carriers total Arkansas miles—and thus HUE tax costs per mile—varied widely.

or "out-of-state taxpayers" as distinguished from "in-state truckers." But petitioners are not and do not purport to be a class of carriers who were domiciled outside Arkansas or who resided in some other State or whose principal place of business was in another State.[22] They were "out-of-state" in one sense only—their trucks were not base registered in Arkansas.[23]

Consider, for example, Jones Truck Lines, Inc. ("JTL"), a named petitioner in this Court and one of the *amici* in the companion case.[24] As a non-Arkansas base registered carrier, JTL is an "out-of-state taxpayer" and one of petitioners' "victims of discrimination" entitled to a monetary

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[22] These are the criteria used by the Court in determining whether a state statute has caused such discrimination. *See generally* Smith, *State Discriminations Against Interstate Commerce*, 74 Calif. L. Rev. 1203, 1219-1220 (1986).

[23] *See* our opening Brief, at 35 n.30. It is a mistake to think of the registration of these trucks in the same way one commonly views automobile registration. If one sees an automobile with a Maryland license plate, for example, it is safe to assume the owner resides in Maryland. Not so with heavy trucks. Interstate carriers register their *fleets* under the International Registration Plan. They have great freedom in choosing the State in which they register. J.A. 80. Many carriers do not even maintain their business records in the State where their fleet is base registered and they are not required to do so. *Id.* In order to register within a State, the carrier need only have a rented "structure" and a "telephone." J.A. 81. There is no requirement that every truck in the fleet actually accrue miles within the State of base registration. *Id.*

Moreover, the IRP deals only with the registration of "power units" (J.A. 78). As a result, a tractor could be registered in one State while the trailer attached to it could be registered in another State. *See* U.S. Dep't of Transportation, Federal Highway Administration, *Road User and Property Taxes on Selected Motor Vehicles* 3 (1987).

[24] Pet. Brief, at iii.

award. Yet by its own admission, JTL "is a corporation organized and existing under the laws of the State of Arkansas, with its principal place of business located in Springdale, Arkansas." J.A. 10. Indeed, at one point in this lawsuit, JTL base registered its 362 trucks in Arkansas. See Pltffs. Ex. 47, at R. 2880. At that time, JTL's trucks averaged $.0092 per mile in HUE tax costs and it was treated by petitioners as an in-state carrier. *Id.*

However, during the course of this litigation, JTL decided to register its fleet outside the State.[25] By petitioners' lights, JTL thus became entitled to wear the mantle of "victim of discrimination." Bluntly put, that is utter nonsense. JTL simply removed the Arkansas plates from its vehicles and replaced them with another State's. That had the same effect on its costs per mile under the tax and on its status as a local or foreign business as if JTL had painted its trucks a different color.

JTL's situation is no mere isolated example. By 1987, *most* of the Arkansas base-registered carriers listed by petitioners had registered their trucks outside the State.[26] Like JTL, each of these carriers is now before the Court seeking to share in a monetary award because, by changing license plates, each was magically transformed

[25] *See* Exhibit 3, at 303, filed with respondents' Brief before the Arkansas Supreme Court on remand from this Court (hereafter "Exhibit 3"). As explained in that Brief (pp. 4-5), Exhibit 3 is the Arkansas Highway and Transportation Department's list of all non-Arkansas base registered carriers subject to the HUE tax in the 1986-87 tax year.

[26] *See* the Addendum to this Brief.

from one who benefited to one who suffered from the HUE tax.[27]

That is far from all that is wrong with petitioners' case. Their position also suffers from the fact that the disparity they designate as "discrimination" consists of *average* costs per mile. Averages may be "seductive," but they can also be highly misleading.[28] Blending their averages with the rhetoric of discrimination, petitioners frame their arguments as if Arkansas imposed different tax rates on them. Of course the HUE tax did no such thing. Petitioners paid an *average* cost of $.032 per mile, which

[27] We must confess to having been confused about the identity of the petitioners in this case. Although petitioners never clearly described themselves in the body of their Brief, they named, among others, Jones Truck Lines and Leon Cawood as two of the class representatives in this Court. Pet. Brief ii-iii. Because Jones and Cawood were Arkansas base registered carriers in 1983 (R. 2871), we had supposed that the petitioners in this Court therefore included both Arkansas and non-Arkansas base registered carriers. See our opening Brief, at 4, 34-36. We found that puzzling, however, because petitioners were seeking a monetary remedy solely for non-Arkansas base registered carriers. *Id.*

Petitioners responded that we were mistaken, that they consisted of only the non-Arkansas base registered carriers. Pet. Reply Brief, at 18 n.18. Why they nevertheless listed Jones and Cawood as petitioners still remained a mystery until we examined Exhibit 3, at pp. 303, 338 (see note 25 *supra*) and discovered that both of these carriers had later changed the registrations of their heavy trucks to a State other than Arkansas and were therefore now purporting to be "out-of-state truckers."

[28] J. Paulos, *Innumeracy: Mathematical Illiteracy and Its Consequences* 126 (1988) ("Recall the chestnut about the man who reports that, though his head is in the oven and his feet in the refrigerator, he's pretty comfortable on average.").

means that some of them paid more and some of them paid less.[29]

Consider, for example, Commercial Carriers Inc. Like Jones Truck Lines, Commercial is a named petitioner and one of the *àmici* in *McKesson*. Petitioners classify Commercial as an out-of-state business because its trucks were base-registered outside of Arkansas. But the record shows that Commercial's 112 heavy trucks logged more than 2 million Arkansas miles during the survey year and wound up with a cost of $.0091 per mile, which was less than the $.01 average per mile cost of the supposedly favored group. R. 2899. Commercial is thus making the remarkable argument that it suffered discrimination at the hands of a tax treating it *better* in terms of average cost per mile than the supposedly favored class.[30]

It is also useful to look at the other side of this coin. More than one-half of the supposedly favored class of Arkansas base-registered truckers—nearly 53 percent—paid more than $.01 per mile in HUE taxes. R. 2950 (Ex. 50). Petitioners have not even attempted to explain why a heavy truck displaying Oklahoma plates is a victim of discrimination if it averaged more than $.01 per mile in HUE tax costs while a truck displaying Arkansas plates that also averaged more than $.01 per mile is not. If, as

[29] There is more to it than that. Petitioners' averages are derived from data consisting of the average cost per mile paid by a particular *carrier* for its entire fleet of heavy trucks. A carrier reporting, for example, an average cost of 3.2 cents per mile would have had trucks that presumably paid less.

[30] Ironically, the carrier with the *lowest* cost per mile under the HUE tax was one of the members of petitioners' class. According to petitioners' evidence, Ohio Pacific Express, Inc.'s 32 heavy trucks travelled 5,258,736 miles in Arkansas and had an average tax cost per mile of $.0011. R. 2858. Ohio Pacific Express's trucks were base-registered outside Arkansas (*id.*).

petitioners contend, the critical factor is how much a truck paid in per-mile costs, it matters not where the truck was base registered or where the company owning the truck was located.[31] Petitioners cannot admit this, however, because to do so would be to concede that their case does not and cannot rest on discrimination against out-of-state businesses.

In the end, petitioners' contentions boil down to the unremarkable proposition that heavy trucks paying the $175 flat tax wound up with different costs per mile depending on how many Arkansas miles they logged. This is the grievance that has produced all their outrage. But as we have discussed, that is not what rendered the HUE tax invalid. Inequality in terms of tax costs per mile for heavy trucks does not, *without more*, violate the Commerce Clause.[32] Registration fees vary widely among the

[31] It is odd for petitioners to invoke "fairness" as a reason for granting them monetary relief. Take two carriers, one with Arkansas plates and one with Texas plates and assume both had costs of 2 cents per mile under the HUE tax. Petitioners' idea of fairness is that the carrier with the Texas plates should get an award, but the carrier with the Arkansas plates should not. Or consider two carriers with headquarters in Springdale, Arkansas. The first registers all its trucks in Illinois; the second in Arkansas. Petitioners' notion of fairness is that the first is eligible for monetary relief while the second is not. Or suppose that a lump sum were paid to petitioners and they somehow distributed it among themselves so that each of them wound up paying 1 cent per mile. Is that "fair" in light of the fact that more than half of the Arkansas base registered carriers—who would not share in this bounty—paid *more* than 1 cent per mile (see p. 24 *supra*)?

[32] At all events, granting petitioners a monetary remedy would not equalize HUE tax costs per mile. *See* note 31 *supra*. There are but three ways retroactively to achieve such equality: (1) order the State to pay each carrier the full amount of the HUE taxes it paid during

States and truckers therefore incur different costs per mile depending on how many miles they run up in a particular State.[33] Yet the Court in *Scheiner* found such fees to be valid. Moreover, Congress has determined that there is no need to equalize tax costs per mile on heavy trucks. Exercising its power to regulate interstate commerce, Congress has for many years imposed a flat tax on trucks weighing more than 55,000 pounds,[34] and thus subjected petitioners and others to the inequality they complain about in this case.[35]

It bears repeating that the Commerce Clause problem with the HUE tax was that a proliferation of similar taxes

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each tax year; (2) find the carrier with the lowest average cost per mile and order the State to pay every other carrier the difference between that amount and the amount it averaged (see note 30 *supra*); or (3) find the carrier with the highest average cost per mile and require every other carrier to pay the State the difference between that amount and the amount that carrier averaged.

None of these "solutions" would depend on the carrier's State of base registration; and each is completely unrelated to any supposed discrimination against foreign businesses.

[33] *See Road User and Property Taxes 1987*, 29-32; and our opening Brief, at 38 & n.38.

[34] In 1982, Congress increased the maximum rate of the federal flat tax to $1900 per year for the heaviest vehicles. Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 513(a), 96 Stat. 2097 (1982). Congress later reduced this to its current maximum of $550 per year. 26 U.S.C. § 4481. (This flat tax applies to trucks with gross weights of at least 55,000 pounds.)

[35] "A 75,000 conventional tractor-semitrailer that travels 50,000 miles per year is, in effect, paying 1.08 cents per mile under this tax. In comparison, a conventional tractor-semitrailer registered at 80,000 pounds that travels 150,000 miles per year pays less than 0.4 cents per mile under this tax, even though its cost responsibility per mile would be higher." *Report of the Secretary of Transportation* VI-14.

in other States might eventually impede interstate commerce as carriers sought to maximize their in-state mileage and avoid additional charges when they crossed State borders. This application of *Scheiner's* internal consistency test is, as the Court explained in *Healy*, based on an evaluation of the *threat* to interstate commerce if all States enacted similar taxes in the future. Striking down the flat tax or, in the case of Arkansas, repealing the statute to comply with *Scheiner*, removed that threat.

On the other hand, retroactive monetary awards against the States in these circumstances—far from advancing interstate commerce—would impede it. In order to pay petitioners, Arkansas would have to use funds that would otherwise be spent on the State's highway system. Yet, as a recent article reported, the nation's highways are badly in need of repair and the "sprawling interstate system is crumbling just as it nears completion." *As Highways Decay Their State Becomes Drag on the Economy*, Wall St. J. A1, Aug. 30, 1989. Vast amounts of money are needed to maintain the highway system and, despite petitioners' claims to the contrary, heavy trucks have not been paying their fair share.[36] If the deterioration continues, the GNP, disposable income, employment and manufacturing productivity will be adversely affected.[37] On the other hand, the potential danger to interstate commerce posed by Arkansas' flat tax has been removed. The State Highway and Transportation Depart-

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[36] *Report of the Secretary of Transportation*, at VI-12 ("vehicles with registered gross weights over 65,000 pounds generally do not now contribute their fair share of highway revenues").

[37] U.S. Dep't of Transportation, Transportation Systems Center, *Highways and the Economy* xii-xiv, 114 (1983); P. Choate, *Bad Roads: The Hidden Costs of Neglect* 6 (1983).

ment's current operating revenues should now be used on the highway system, not to rectify some non-existent discrimination against a group of carriers who have in common only the fact that their heavy trucks were not displaying Arkansas plates when they inflicted their damage.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening Brief, the judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted.

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ADDENDUM

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Petitioners' survey, from which they derived their average costs per mile of Arkansas base-registered trucks, listed 2,903 such heavy trucks subject to the HUE tax. R. 2951. By 1987, more than 65% of these trucks had switched base-registration to a State other than Arkansas. Exhibit 3 (note 25 *supra*) shows that the following carriers listed as base-registered in Arkansas on petitioners' Exhibit 47 had registered their trucks outside Arkansas by the 1986-87 tax year:

Atlas Carriers Inc. (compare R. 2870 with Ex. 3, pp. 27-28)

Brazos Inc. (compare R. 2870 with Ex. 3, p. 59)

C&L Trucking Inc. (compare R. 2870 with Ex. 3, pp. 75, 77-81)

Cargill Inc. (compare R. 2870 with Ex. 3, p. 86)

Coca-Cola Bottling Co. (compare R. 2870 with Ex. 3, pp. 107-08)

Delp Inc. (compare R. 2871 with Ex. 3, p. 144)

Foremost Dairies Inc. (compare R. 2871 with Ex. 3, p. 194)

Harvey's Trucking Inc. (compare R. 2871 with Ex. 3, pp. 239, 9272)

Howard Barnes Livestock Trucking (compare R. 2871 with Ex. 3, p. 257)

J & J Trucking (compare R. 2871 with Ex. 3, pp. 266, 272)

J B Hunt Transport Inc. (compare R. 2871 with Ex. 3, p. 267)

J D & Billy Hines Trucking Inc. (compare R. 2871 with Ex. 3, p. 268, 285-86)

Jerry Hudson (compare R. 2871 with Ex. 3, p. 288)

Jones Truck Lines Inc. (compare R. 2871 with Ex. 3, p. 303)

Lasley Trucking Co., Inc. (compare R. 2871 with Ex. 3, p. 332)

Lendel Vines (compare R. 2872 with Ex. 3, p. 338)

Leon Cawood Trucking (compare R. 2871 with Ex. 3, p. 338)

Mass Merchandisers, Inc. (compare R. 2872 with Ex. 3, p. 363)

Nabisco Brands Inc. (compare R. 2872 with Ex. 3, p. 393)

O W Smith Transport Inc. (compare R. 2872 with Ex. 3, pp. 402, 408)

PAM Transport Inc. (compare R. 2872 with Ex. 3, pp. 410, 413-14)

R & D Trucking, Inc. (compare R. 2872 with Ex. 3, pp. 435, 438-39).

Ramon Rine Inc. (compare R. 2872 with Ex. 3, p. 442)

Richard Berry (compare R. 2872 with Ex. 3, p. 456)

Ricketts Trucking Co. Inc. (compare R. 2872 with Ex. 3, p. 458)

S & T Trucking (compare R. 2872 with Ex. 3, p. 487)

Scheduled Truckways Inc. (compare R. 2873 with Ex. 3, p. 490)

Sentinel Wood Treating, Inc. (compare R. 2873 with Ex. 3, p. 495)

Shippers Transports (compare R. 2873 with Ex. 3, p. 501)

Silica Transport Inc. (compare R. 2873 with Ex. 3, p. 503)

Singer Transportation Co., Inc. (compare R. 2873 with Ex. 3, p. 504)

Smith Trucking (compare R. 2873 with Ex. 3, p. 506)

Transus, Inc. (compare R. 2873 with Ex. 3, p. 569)

Tyson Foods Inc. (compare R. 2873 with Ex. 3, p. 578)

Virco Mfg. Corp. (compare R. 2873 with Ex. 3, p. 589)

Vulcan Material Co. (compare R. 2873 with Ex. 3, p. 590)

Willis Shaw Frozen Express Inc. (compare R. 2873 with Ex. 3, p. 613)